

United States  
Court of Appeals  
for the Ninth Circuit

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WALTER C. DURST, assignee for the benefit of  
creditors of Jack P. Kalpakoff and Mary Kal-  
pakoff, Debtors, Appellant,

vs.

JACK P. KALPAKOFF and MARY KALPA-  
KOFF, and WILLIAM CHERNABAEFF,  
Trustee in Bankruptcy of the Estate of Jack P.  
Kalpakoff and Mary Kalpakoff, Appellees.

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Transcript of Record

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Appeals from the United States District Court for the Southern  
District of California, Central Division

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK

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No. 14655

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United States  
Court of Appeals  
for the Ninth Circuit

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WALTER C. DURST, assignee for the benefit of  
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Appeals from the United States District Court for the Southern  
District of California, Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MORRIS LAVINE,

215 West Seventh Street,  
Suite 620,  
Los Angeles 14, California.

For Appellees:

SIEMON & SIEMON,

259 Haberfelde Building,  
Bakersfield, California.



In the District Court of the United States, Southern District of California, Central Division

No. 60964-T—Bkey.

In the Matter of JACK P. KALPAKOFF, Debtor.

APPROVAL OF DEBTOR'S PETITION AND  
ORDER OF REFERENCE

Under Section 422, Chapter XII, of the Real  
Property Bankruptcy Act

At Los Angeles, in said District, on April 28, 1954 before the said Court the petition of Jack P. Kalpakoff that he desires to obtain relief under Section 422 of the Bankruptcy Act and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Jack P. Kalpakoff shall attend before said referee on May 6, 1954 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of

said Court, and the seal thereof, at Los Angeles, in said District, on April 28, 1954.

EDMUND L. SMITH,

Clerk

/s/ By ARTHUR P. FLORES,

Deputy Clerk

[Endorsed]: Filed April 28, 1954.

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In the District Court of the United States, Southern District of California, Central Division

No. 60964-T—Bkey.

In the Matter of MARY KALPAKOFF, Debtor.

### APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE

Under Section 422, Chapter XII, of the Real Property Bankruptcy Act

At Los Angeles, in said District, on April 28, 1954, before the said Court the petition of Mary Kalpakoff that she desires to obtain relief under Section 422 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said Acts;

and that the said Mary Kalpakoff shall attend before said referee on May 6th, 1954 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 28, 1954.

EDMUND L. SMITH,

Clerk

/s/ By ARTHUR P. FLORES,

Deputy Clerk

[Endorsed]: Filed April 28, 1954.

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[Title of District Court and Cause No. 60963.]

### DEBTOR'S PETITION

To the Honorable The Judges of the District Court  
of the United States for the Southern District  
of California:

The petition of Jack P. Kalpakoff residing at Route 4, Box 803, in the City of Lancaster, County of Los Angeles, State of California, (engaged in the business of farming), respectfully represents:

1. Your petitioner has had his principal place of business at Sixtieth and "J" Streets, Lancaster, California, within the above judicial district, for a longer portion of the six months immediately pre-

ceding the filing of this petition than in any other judicial district.

2. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

3. Your petitioner is unable to pay his debts as they mature, and proposes the following arrangement with his secured creditors: to be paid 100 cents on the dollar in five years from operation or sale of 160 acre and 240 acre alfalfa ranches in which debtors have equitable interest other than right to redeem from a sale had before filing this petition.

4. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy. 10 days requested.

5. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act. Ten days requested within which to file.

6. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory

contracts, as required by the provisions of said Act. Ten days requested within which to file.

7. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act. Ten days requested within which to file.

Wherefore your petitioner prays, that proceedings may be had upon this petition in accordance with the provisions of chapter XII of the Act of Congress relating to bankruptcy.

/s/ JACK P. KALPAKOFF,  
Petitioner

DEBTOR IN PROPRIA PERSONA  
Attorney for Petitioners

United States of America,  
State of California—ss.

I, Jack P. Kalpakoff, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ JACK P. KALPAKOFF, Petitioner

Subscribed and sworn to before me this 14th day of April, 1954.

[Seal] /s/ WAYNE M. HAMILTON,  
Notary Public

\* \* \* \* \*

Schedule B. Statement of All Property of Debtor  
Schedule B-1—Real Estate

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.—Estimated value of Debtor’s Interest.

Petitioner has an undivided one-half equitable interest as a resulting cestui que trust of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment, created November 25, 1949, wherein Walter C. Durst is the assignee for the benefit of the creditors, in the lands described as follows:

The North half of the Northwest quarter of Section 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of Section 23, Township 9 North, Range 14 West, Kern County, California.....\$ 65,000.00

The Northwest quarter of Section 23, Township 7, North Range 13 West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning.... 65,000.00

Total.....\$130,000.00

/s/ JACK P. KALPAKOFF, Petitioner

\* \* \* \* \*

[Endorsed]: Filed April 28, 1954.



[Title of District Court and Cause No. 60963.]

AMENDED PETITION AND SCHEDULES

Filed to correct and supplement former petition and schedules; to include proposed arrangement and complete list of creditors having no security (Schedule A-3) other than such security as they may have under the assignment to Walter C. Durst for the benefit of creditors, said creditors not being listed in former petition; and to tender summary of liabilities and assets and classification of creditors as required by Sec. 435.

This petition and these schedules are duplicates of petition and schedules in the Matter of Mary Kalpakoff, Debtor, Bankruptcy No. 60964-T, wife of the above captioned debtor, the assets being community property of the spouses and the liabilities being common to both.

Dated: May 24th, 1954.

SIEMON & SIEMON,

/s/ By ALFRED SIEMON,

Attorneys for Debtor

\* \* \* \* \*

Schedule B.—Statement of All Property of Bankrupt

Schedule B-1—Real Estate

Location and Description of all real estate owned by debtor, or held by him, whether under deed, lease or contract—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.—Estimated value of debtor's interest.

Petitioner has an undivided one-half equitable interest as a resulting cestui que trust of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment, cre-

ated November 25, 1949, wherein Walter C. Durst is the assignee for the benefit of the creditors, in the lands described as follows:

The North half of the Northwest quarter of Section 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of Section 23, Township 9 North, Range 14 West, Kern County, California.....	\$ 65,000.00
The Northwest quarter of Section 23, Township 7, North Range 13 West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning .....	65,000.00
Total.....	\$130,000.00

/s/ JACK P. KALPAKOFF, Petitioner

\* \* \* \* \*

[Endorsed]: Filed May 27, 1954.

[Title of District Court and Cause 60963-T.]

PETITION TO DIRECT ASSIGNEE FOR THE  
BENEFIT OF CREDITORS TO TURN  
OVER PROPERTY

To Benno M. Brink, Referee in Bankruptcy:

The petition of Jack P. Kalpakoff respectfully represents:

1. On April 28, 1954, your petitioner filed his

petition herein under Chapter XII of the Bankruptcy Act, proposing an arrangement; and has petitioned for the appointment of a trustee which is now pending action thereon.

2. Prior to filing said petition proposing an arrangement and on November 25, 1949, petitioner and his wife Mary Kalpakoff, Debtor in Bankruptcy No. 60964-T, made a general assignment for the benefit of their creditors to Walter C. Durst whereby they assigned to said Durst all of their property which is particularly described in Exhibit "A" hereto attached and made a part hereof by this reference as fully as if the description of said property were set forth at this place; that concurrently with the execution of said assignment your petitioner executed deeds and transfers which conveyed all of the right, title and interest of petitioner in said property to said Durst; that at said time petitioner, at the direction of said assignee, made and delivered a promissory note for the sum of \$90,000.00 payable to said assignee on demand, and made, executed and acknowledged crop mortgages whereby petitioner mortgaged to said assignee all crops growing and to be grown on parcels 1 and 2 of the real property so conveyed to secure the payment of said promissory note, and said assignee caused said mortgages to be recorded in each of the counties where said parcels are respectively located; that thereupon and as a part of the same transaction petitioner made, executed and acknowledged a so-called General Assignment, a copy of which is hereto attached, marked Exhibit "B" and made a

part hereof by this reference as fully as if set forth at length at this place; and, at the same time, at the request of said assignee, and on his advice and direction, executed an agreement, in writing, to pay assignee fees and commissions, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof as fully as if set forth at length at this place.

3. Notwithstanding the matters alleged in the preceding paragraph petitioner remained and has continued to remain and is now in the actual and exclusive possession of all of said property except parcels 3, 4 and 5 thereof as described in Exhibit "A", which were sold by the assignee since the assignment; and that the assignee still holds the legal record title to all of said property other than that which has been sold as aforesaid and still holds and retains said note and crop mortgage.

4. Your petitioner has demanded that said assignee reconvey all of the property he now holds, and that he release said crop mortgages of record, but he has refused and continues to refuse to reconvey any of said property or to release either of said crop mortgages; that petitioner commenced and is maintaining an action against the assignee in the Superior Court of the State of California in and for the County of Los Angeles for the recovery of their properties and they attach a copy of the verified Third Amended Complaint therein to this petition; that the assignee obstructed petitioner from obtaining any relief therein by dilatory proceedings and by compelling petitioner to bring in and make

all of petitioner's creditors parties defendant; that in the meantime the assignee failed to protect the properties assigned to him from foreclosure and sale, defaulted on obligations secured by deeds of trust on Parcels 1 and 2, and said properties were advertised for sale on foreclosure; that thereupon petitioner demanded of the assignee that he remedy such defaults and prevent the loss of said properties; that the assignee, in response to such demand, prepared the original petition herein for petitioner, caused petitioner to sign and verify it, appeared with petitioner and filed said petition, and secured the stay-order restraining foreclosure proceedings on April 29, 1954; and that thereafter the assignee advised petitioner that he, the assignee, could do nothing further for petitioner, that he was not acting as petitioner's attorney, and for petitioner to get an attorney to represent him in this proceeding.

Wherefore, your petitioner prays that Walter C. Durst, as such assignee, be directed to surrender and reconvey all of the property he now holds under the assignment for the benefit of creditors to your petitioner or to the trustee who may be appointed herein, and that your petitioner have such other and further relief as is just.

/s/ JACK P. KALPAKOFF,  
Petitioner

/s/ SIEMON and SIEMON,  
Attorneys for Petitioner

Duly Verified.

## EXHIBIT "B"

## GENERAL ASSIGNMENT

This Assignment, made this 25th day of November, 1949, by Jack P. Kalpakoff and Mary Kalpakoff, his wife, of Lancaster, California, parties of the first part, hereinafter referred to as assignor, to Walter C. Durst of Los Angeles, California, party of the second part, hereinafter referred to as assignee.

Witnesseth: That said assignor, for and in consideration of the covenants and agreements to be performed by the party of the second part, as hereinafter contained, and of the sum of One Dollar (\$1.00) to assignor in hand paid by said assignee, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, assign, convey and transfer unto said assignee, his successors and assigns, in trust, for the benefit of assignor's creditors generally, all of the property of the assignor of every kind and nature and wheresoever situated, both real and personal, and any interest or equity therein not exempt from execution, including all appurtenances, tools, equipment, livestock, growing crops, books accounts, books, bills receivable, cash on hand, choses in action, insurance policies, and all other personal property of every kind and nature situated in or pertaining to that certain ranch, known as the "Home Ranch" and now owned and conducted by said assignor, in the City of Lancaster, County of Los Angeles, State of California.

Subject however, to all valid and subsisting liens and encumbrances thereon. Also, that real property located in the City of Los Angeles, County of Los Angeles and State of California.

There is included in this Assignment, leases and leasehold interests in real estate and all real property covered by the Agreement for Sale of Real Estate recorded November 27, 1948, in Book 1396 of Official Records, page 283, Kern County Records, being property known as "The Potato Ranch".

Said assignee is to receive the said property, conduct the said business, should he deem it proper, and is hereby authorized at any time after the signing hereof by the assignor to sell and dispose of the said property upon such time and terms as he may see fit, and is to pay to creditors of the first party pro rata, according to the several indebtedness due to them from the said assignor, the net proceeds arising from the conducting of said business and sale and disposal of said property after deducting all moneys which said assignee may at his option pay for the discharge of any lien on any of said property and any indebtedness which under the law is entitled to priority of payment, and all expenses, including a reasonable fee to assignee and his attorney.

This assignment shall be construed as a general assignment for the benefit of creditors generally.

In Witness whereof, the said parties have here-

unto set their hands the day and year first above written.

JACK P. KALPAKOFF,  
MARY KALPAKOFF,

Assignor

WALTER C. DURST,  
Assignee

State of California,  
County of Los Angeles—ss.

On November 25, 1949 before me, the undersigned, a Notary Public in and for said County and State, personally appeared Jack P. Kalpakoff and Mary Kalpakoff and Walter C. Durst; known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

Witness my hand and official seal.

[Seal]

PHILIP M. SCHWABACHER,  
Notary Public in and for said  
County and State

#### EXHIBIT "C"

#### AGREEMENT RE FEES OF ASSIGNEE FOR THE BENEFIT OF CREDITORS

The undersigned hereby agrees that the fees and compensation of the assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, shall be ten per cent of all money and property of the assignment estate, which shall be ad-



ministered or handled by Walter C. Durst, Assignee for the Benefit of Creditors, including property returned to the Assignors.

Dated this 25th day of November, 1949.

JACK P. KALPAKOFF  
MARY KALPAKOFF

[Endorsed]: Filed June 2, 1954.

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[Title of District Court and Cause 60964.]

PETITION TO DIRECT ASSIGNEE FOR THE  
BENEFIT OF CREDITORS TO TURN  
OVER PROPERTY

To Benno M. Brink, Referee in Bankruptcy:

The petition of Mary Kalpakoff respectfully represents:

[Printer's Note: Paragraphs 1-4, Exhibits B and C are the same as in Cause 60963 and are set out at pages 10-17.]

Petitioner alleges that she is the wife of Jack P. Kalpakoff, the debtor in Bankruptcy No. 60963-T; that she read and is familiar with the Petition to Direct Assignee for Benefit of Creditors to Turn Over Property which is being filed in Bankruptcy No. 60963-T concurrently with this petition; that she joined in and co-signed and executed the assignment, conveyances and transfers alleged in said petition to have been signed and executed by her husband; that the property transferred was the

community property of Jack P. Kalpakoff and your petitioner herein; and that your petitioner joins in and adopts as her petition in this matter all of the allegations in the petition of her husband Jack P. Kalpakoff.

Wherefore, your petitioner prays that Walter C. Durst, as such assignee, be directed to surrender and reconvey all of the property he now holds under the assignment for the benefit of creditors to your petitioner or to the trustee who may be appointed herein, and that your petitioner have such other and further relief as is just.

/s/ MARY KALPAKOFF,  
Petitioner

/s/ SIEMON & SIEMON,  
Attorney for Petitioner

Duly Verified.

[Endorsed]: Filed June 2, 1954.

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[Title of District Court and Cause 60963.]

### ORDER TO SHOW CAUSE

At Los Angeles, in said District, on the 2nd day of June, 1954.

Upon the annexed petition of Jack P. Kalpakoff, the above named debtor, verified the 1st day of June, 1954, and sufficient reason appearing to me therefor, it is

Ordered that you, Walter C. Durst, show cause,

if any you have, before me in Room 323, United States Post Office and Court House Building, 312 N. Spring Street, Los Angeles, California, on the 9th day of June, 1954, at 10 o'clock in the forenoon of that day, or as soon thereafter as the matter can be heard, why you should not be required to turn over, release, reconvey and surrender to debtor or any trustee who may have been appointed herein such title, claims, liens, assignments and conveyances you have and/or hold from debtor as assignee for the benefit of his creditors of and upon the property of debtor described in Exhibit "A" attached to said petition, why you should not be required to release of record the crop mortgages referred to in said petition, why you should not be required to account, and why this court should not grant said debtor such other and further relief as is just.

You are notified that in the event you fail to show such cause the court will make such order in the premises as shall appear to be required by law and the facts.

This order and the annexed petition is directed to be served upon you at least five days prior to the return day hereon.

Dated: Los Angeles, California, June 2, 1954.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Cause No. 60964.]

### ORDER TO SHOW CAUSE

[Printer's Note: Order to Show is same as in 60963 set out at pages 18-19 of this printed record.]

[Endorsed]: Filed June 2, 1954.

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[Title of District Court and Causes 60963-4.]

### SPECIAL APPEARANCE BY RESPONDENT WALTER C. DURST

To the Honorable Benno M. Brink, Referee in  
Bankruptcy:

Comes now the respondent Walter C. Durst, appearing specially, and respectfully alleges that the court is without jurisdiction to (1) summarily remove Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, or (2) require the assignee to turn over, release, reconvey and surrender to any person whomsoever, save upon fulfillment of the general assignment when the residue thereof will pass to the debtors, such title, claims, liens, assignments and conveyances, crop mortgages, or any other conveyances of any kind or character executed by Jack P. Kalpakoff and Mary Kalpakoff to Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, commenc-

ing with the General Assignment dated November 25, 1949, and all succeeding documents, denied by answer filed by Walter C. Durst, in pending Los Angeles Superior Court Action No. Transferred to Los Angeles SFC 914.

I.

Respondent without waiving any of his rights under the special appearance invites the court to consider the following:

(1) The appointment of an appraiser to appraise the two ranches of the debtors to determine the value of the interest of the debtors therein as resulting cestui que trust under the general assignment;

(2) The debtors' proposal to pay their secured creditors 100 cents on the dollar in five years from operation or sale of 160 acre and 240 acre alfalfa ranches in which debtors have an equitable interest other than the right to redeem from a sale before filing of their petitions herein.

Dated this 9th day of June, 1954.

/s/ WALTER C. DURST,  
Respondent Appearing Specially

Acknowledgment of Service attached.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Causes 60963-4.]

SPECIAL APPEARANCE AND REQUEST  
FOR NOTICE OF ENTRY OF ORDERS

Under Rule 204-A of the District Court of Southern California Central Division

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Walter C. Durst as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, hereby appears specially, for the purpose of requesting that he be given written notice by mail of the Entry of Orders in the above proceedings.

Dated this 8th day of June, 1954.

/s/ WALTER C. DURST,  
Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

[Endorsed]: Filed June 11, 1954.

---

[Title of District Court and Causes 60963-4.]

ORDER REQUIRING AND DIRECTING ASSIGNEE FOR THE BENEFIT OF CREDITORS TO DELIVER PROPERTY IN HIS POSSESSION

The Order to Show Cause directed to Walter C. Durst, as Assignee for the benefit of the creditors of the above named debtor, came on duly and regu-

larly for hearing before the undersigned Referee, at the hour of 10:00 o'clock a.m., June 9, 1954, at the Referee's Courtroom, in the Federal Building, Los Angeles, California. Alfred Siemon of Siemon & Siemon appeared on behalf of the debtor, and Walter C. Durst appeared in his own behalf by special appearance served on counsel and filed herein. Respondent presented argument on the points and authorities annexed to his special appearance; and the same were duly considered. The allegations of the Debtor's Petition, upon which the Order to Show Cause had been issued, were not controverted or denied; and said allegations are hereby found to be true.

Now, Therefore, in consideration of the premises, It Is Hereby Ordered that you, the said Walter C. Durst, within five (5) days after a certified copy of this Order shall have been served upon you, turn over and deliver to William Chernabaeff, Trustee herein, all property of the debtor in your possession or under your control which you acquired as Assignee for the benefit of creditors under, pursuant to and by the General Assignment for the Benefit of Creditors, dated November 25, 1949, a copy of which is attached to the Petition of the debtor to direct you, as Assignee for the benefit of creditors, to turn over property and served upon you with said Order to Show Cause; and that, to such end and for such purpose, you forthwith transfer and convey unto said Trustee all of your right, title and interest in and to the real and per-

sonal property hereinafter particularly described, to wit:

1. Real Property.

Parcel 1: The North half of the Northwest quarter of Section 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of section 23, Township 9 North, Range 14 West, Kern County, California, a total of 240 acres.

Parcel 2: The Northwest quarter of Section 23, Township 7 North, Range 13 West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M described as follows: Beginning at the northwest corner of said Southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said Southeast Quarter 104 feet; thence West parallel with the North line of said Southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning.

2. Ranch Equipment.

John Deere Disc; Model D John Deere Tractor No. 51391; No. 7 McCormick Deere Mower; Case Dump Rake; Ford Tractor & Mower; Border Fordson Disc; John Deere Side Del Rake; McDermott Bale Loader, Model 44, Ser. 554; John Deere Gang Plow; Horse; Harness; John Deere Plow, 16" 2 way; John Deere Land Leveler; Case Baler; Oliver Baler; Truck; 1948 Ford Tractor No. 8N129697; Ford Tractor Air Cleaner, Dual Wheels;



Nowner Scraper, Dearborn Model 19-5, Ser. No. 3998; 1942 Ford Truck; Fairbanks Morse Pump w/A.C. Motor, 1-120 gal. tank, pipe and misc. fittings, pumps and pumping equipment; 10 L John Deere Killefer Hydraulic Landlever, Model AK Ser. 0052; No. 300, Atlas Hydraulic Power Control Unit; Be-Ge Hydraulic Carrying Scraper Ser. No. 51008, with Be Ge Pump and Dual Control Valve; LS400 John Deere Lindeman Landscraper, Ser. No. 0053; Allis Chalmers Tractor & Mower; Admiral Baler; Land Leveler home made; Power saw, Cauptman, 7" wide, 1 H.P. motor; Ferguson Scraper and Border Disc. 1945; Hay Wagon; Thomas Drill; Drill Best; Brick Scraper, Towner; Fresno Scraper; International Tractor, Engine No. F.T.M.-1946, Ser. No. TAC 4055, Model T-40 Crawler, w/Dozer Blade; Hay Wagon, 1948; 9 Heifers; 2 Bulls; 2 Cows; 60 Sheep, ewes; Tank and Pump.

It Is Further Ordered that you forthwith deliver to the Trustee full and complete satisfaction of the promissory note in the principal sum of \$90,000.00, and of the mortgage or mortgages of crops to be grown on the above described real properties executed by the debtor to you, as Assignee for the benefit of creditors, on or about November 25, 1949, as security for the payment of said note, with proper reference in said releases and satisfactions reciting the dates and places of recordation of each of said crop mortgages.

Compliance with the above Order is directed and may be made by you by delivery of duly executed

conveyances and releases and satisfactions to this Court in the name of and for said Trustee within the time above stated.

You are further Ordered to account to this Court within thirty (30) days from the date this Order shall have been served upon you for the disposition by you of all receipts of money, things of value and any other property received by you as the Assignee for the benefit of creditors, as aforesaid.

Dated: June 15, 1954.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed June 15, 1954.

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[Title of District Court and Causes 60963-4.]

PETITION FOR ORDER STAYING THE EXECUTION OF THE ORDER OF JUNE 15, 1954 RESPECTING CONVEYANCES AND RELEASES WITH ORDER

To the Honorable Benno M. Brink, Referee in Bankruptcy:

The petition of Walter C. Durst, respectfully represents and shows:

I.

That no order of confirmation of the debtors' plan of arrangement has been made and entered herein.

## II.

That in the event there is no order of confirmation made and entered herein, and in the event petitioner should prevail in the hereinafter mentioned Superior Court Action, the execution of the order of June 15, 1954, made and entered herein by this court would destroy all of the rights of petitioner as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, and subject petitioner to great and irreparable damage and expose petitioner to suits for damages for waste of the assets of the general assignment, and possible personal liability. That as will hereinafter appear in the interest of Justice the execution of the said order respecting conveyances, releases, and the deprivation of petitioner of other rights should be stayed.

## III.

That petitioner is the assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff by virtue of a general assignment dated November 25, 1949, grant deeds conveying title, bills of sale, promissory note secured by crop mortgages, all duly recorded, permanent assignment to the A. V. Hay Growers Association, dated on or about May 16, 1951, covering the Lancaster, California, ranch of the debtors, and permanent assignment to the A. V. Hay Growers Association, dated on or about April 29, 1953, covering the Rosamond, California Ranch of the debtors, together with other documents and instruments signed by the debtors

and as such assignee is by the admission of the debtors a secured creditor herein.

#### IV.

The Cancellation of the aforesaid documents is allegedly the subject of litigation in the Superior Court of Los Angeles County, Action No. Transferred to Los Angeles SFC 914, entitled Jack P. Kalpakoff and Mary Kalpakoff, plaintiffs, vs. Walter C. Durst, et al defendants, which said action is at issue as to the defendant Walter C. Durst, by answer filed in said action November 20, 1953 by said defendant Walter C. Durst.

#### V.

That the debtors herein have reserved all causes of action in said suit and propose in their plan of arrangement for the Trustee appointed by the Court herein to take over and be substituted for the debtors as plaintiff in the action against Walter C. Durst referred to in Amended Schedule A-2(7) and amended Schedule B-3, and prosecute same on behalf of the estate for cancellation of the assignment for benefit of creditors and for damages for fraud, neglect, nonperformance of duties and mismanagement of the assignee for the benefit of creditors, and to such end to file such amendments to the pleadings and initiate and prosecute such proceedings in said action as may appear to be required.

#### VI.

That by the aforesaid order made and entered

herein dated June 15, 1954, your petitioner is among other things ordered to transfer and convey unto the Trustee appointed herein by the Court all of petitioner's right, title and interest in and to the real property in said order described, and to deliver to the Trustee full and complete satisfaction of the promissory note and of the mortgages and mortgages of crops to be grown on the said real property executed by the debtors to Walter C. Durst as Assignee for the benefit of creditors, on or about November 25, 1949, as security for the payment of said note, with proper reference in said releases and satisfactions reciting the dates and places of recordation of each of said crop mortgages.

#### VII.

That there is now pending before the Court the matter of the dismissal of these debtor proceedings which, if effected would destroy petitioner's rights unless the execution of the said order be stayed herein as aforesaid.

Wherefore your petitioner prays that an order be made and entered herein staying the execution of the order of June 15, 1954, as to all of the things and matters provided therein to be done by Walter C. Durst, assignee for the benefit of creditors, pending and until the order of confirmation of a plan of arrangement in these debtor proceedings becomes final, and should there be no order confirming plan of arrangement herein then the aforesaid order of June 15, 1954, shall become void and of no effect, and all provisions thereof to be carried out by the

said Assignee shall be cancelled and nullified and the assignee shall retain all rights which he had as such assignee prior to the filing of these debtor proceedings.

/s/ WALTER C. DURST,  
Petitioner in Propria Persona.

Petition denied this 23rd day of June, 1954.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 23, 1954.

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[Title of District Court and Causes 60963-4.]

PETITION FOR REVIEW OF ORDERS OF  
JUNE 15, 1954, AND JUNE 23, 1954

To Benno M. Brink, Referee in Bankruptcy:

The petition of Walter C. Durst, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff respectfully represents:

1. Your petitioner is aggrieved by the order herein of Benno M. Brink, referee in Bankruptcy, dated June 15, 1954, a copy of which order is annexed hereto, Marked Exhibit "A" and made a part hereof;

2. Petitioner is aggrieved by the order herein of Benno M. Brink upon petition for Order Staying

the Execution of the order of June 15, 1954 Respecting conveyances and releases with order, inscribed "Petition denied this 23rd day of June 1954," a copy of which petition and order is annexed hereto, marked Exhibit "B" and made a part hereof;

3. The referee erred in said order of June 15, 1954, in that he overruled the special appearance of petitioner whereby petitioner challenged the jurisdiction of the referee to (1) summarily remove Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, or (2) require the assignee to turn over, release, reconvey and surrender to any person whomsoever, save upon fulfillment of the general assignment when the residue thereof will pass to the debtors, such title, claims, liens, assignments and conveyances, crop mortgages, or any other conveyances of any kind or character executed by Jack P. Kalpakoff and Mary Kalpakoff to Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, commencing with the General Assignment dated November 25, 1949, and all succeeding documents;

4. The referee erred in that the matters alleged in the debtors' petitions and particularly the verified complaint attached thereto, are subject to the prior jurisdiction of the Superior Court of Los Angeles County, in pending Los Angeles Superior Court Action Filed April 23, 1953, being No. Transferred to Los Angeles SFC 914, entitled Jack P.

Kalpakoff and Mary Kalpakoff, plaintiffs vs. Walter C. Durst, et al., defendants, and at issue therein by answer filed November 20, 1953, by Walter C. Durst;

5. The referee erred in respect to the said order of June 15, 1954, and the order of June 23, 1954, in that, assuming but not conceding that the assumption of jurisdiction by the referee was proper, the said order of June 15, 1954 deprives the general assignment of its rights without due process of law, deprives the assignee for the benefit of creditors, a trustee, of his rights without due process of law, exposes the assets of the general assignment to waste, and exposes the assignee to liability therefor, by ordering reconveyances and releases and omitting to provide for the nullification of all action done or taken pursuant to said order, (1) in the event the within debtors' proceedings be dismissed, or (2) in the event no order of confirmation of arrangement be made and entered in these debtors' proceedings;

6. The referee erred in respect to the Order of June 23, 1954, by denying the relief sought for the protection and preservation of the general assignment in the event of dismissal of the debtor proceedings or the failure to enter an order confirming arrangement therein;

7. The referee erred in said order of June 15, 1954, in that he exceeded his jurisdiction by ordering the respondent to reconvey and release, an estate or interest greater than the estate or interest of



the debtors as beneficiaries of the general assignment to-wit, the estate or interest of resulting cestui que trust, and no more, upon the fulfillment of the general assignment through payment of all creditor beneficiaries, and expenses of administration through sale of the assets of the general assignment, subject only to delivery and accounting in the event of order confirming plan of arrangement; but not otherwise;

8. The referee erred at the hearing on June 9, 1954, in that he ruled in effect that District Court Rule 7 was inapplicable when he denied respondent's request that the proposed order of June 15, 1954, be submitted to respondent before same was signed by the referee;

9. The referee erred with respect to said order of June 15, 1954, in that he found that the allegations of the debtors' petitions were not controverted or denied;

10. The referee erred in the order of June 15, 1954, in that he found the allegations of the debtors' petitions to be true, and omitted to find that same were taken as true only by reason of the respondent's motion to dismiss;

11. The referee erred in the order of June 15, 1954, in that he omitted to recite in said order that the respondent had made a motion to dismiss, the grounds therefor; and the ruling thereon;

12. The referee erred in that he denied the respondent's motion to dismiss the Debtor's Petitions

and discharge the order to show cause which motion was made by petitioner on the ground that an express trust in lands created to pay the grantor's debts cannot be revoked without the consent of all the creditors for whose benefit it was created; nor can it be extinguished without the beneficiaries' consent, except by entire fulfillment, or by its object becoming impossible or unlawful; that the debtors' petitions did not state a cause of action for the relief sought, and that the identical issues were joined in the pending State court action;

13. The referee erred at the hearing of June 9, 1954, in that he omitted to rule upon respondent's motion that all of the creditor beneficiaries of the general assignment were proper parties respondent to the debtors' petitions and the orders to show cause thereon, and that the referee omitted to order same made respondents on his own motion;

14. The referee erred at the hearing of June 9, 1954, in that he ruled in effect that Rule 43c of the Federal Rules of Civil Procedure was inapplicable when he ruled upon respondent's offer of proof that the introduction into evidence of the documents upon which the respondent relies was unnecessary.

Wherefore your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to bankruptcy, that said order be reversed, and that the debtor's petition be dismissed as neither conferring jurisdiction or stating a cause of action prior to order of confirmation, and if same be found to be

within the jurisdiction of the court and to state a cause of action, that same be remanded for further proceedings in accordance with the order of the District Judge and for such other relief as may appear proper.

/s/ WALTER C. DURST,

Petitioner in Propria Persona.

Duly Verified.

[Endorsed]: Filed June 24, 1954.

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[Title of District Court and Causes 60963-4.]

CERTIFICATE OF FACTS SHOWING CON-  
TEMPT IN PROCEEDINGS BEFORE  
REFEREE

To the Honorable Ernest A. Tolin, Judge of the  
District Court of the United States, Southern  
District of California, Central Division:

I, Benno M. Brink, Referee in Bankruptcy in the  
above entitled proceedings, upon petition of the  
above named debtors, after due notice to Walter C.  
Durst and after a hearing at which said Durst per-  
sonally appeared specially in his own behalf and  
filed and presented objections to my authority in  
the premises and after said objections were dis-  
allowed made an order requiring said Durst to con-  
vey property of debtors held by him as their as-  
signee for the benefit of creditors and to satisfy  
a certain promissory note and chattel mortgages  
given by debtors to Durst as security for the pay-

ment of debtors' creditors, all of which will more fully appear from a copy of said order hereunto attached in which I recited that I found all of the allegations of the petition to be true. The allegations in each of said matters were and are identical except for matters bearing on the relationship of debtors to each other; and I am attaching a copy of the petition in proceeding No. 60963-T, omitting exhibits attached thereto which were merely descriptive of the conveyances and property involved. At said hearing said Durst admitted, in response to my questions, that the subject property had been conveyed and said note and mortgages had been made to him as a general assignment for the benefit of the creditors of the debtors, and that he held no other claim or title to the property.

I therefore made said order, and a certified copy thereof in each of said matters was served upon him on June . . . ., 1954, and more than five days have expired since said service; and he, the said Durst, has not complied with said order in any respect whatever, has disobeyed and continued to disobey each and every requirement thereof.

Dated: July 7, 1954.

Respectfully submitted,

/s/ BENNO M. BRINK,  
Referee in Bankruptcy

[Printer's Note: Order appearing here is set out at pages 22-26, Petition at page 10 of this printed record.]

[Endorsed]: Filed July 7, 1954.

[Title of District Court and Causes 60963-4.]

ORDER TO SHOW CAUSE WHY ASSIGNEE  
OF DEBTORS FOR BENEFIT OF CREDI-  
TORS SHOULD NOT BE ADJUDGED IN  
CONTEMPT AND COMMITTED UNTIL  
HE OBEYS LAWFUL ORDER

At Los Angeles, California, in said District and  
Division, on this 7th day of July, 1954.

The petition of William Chernabaeff, trustee in  
the above entitled matters, that the Referee certify  
the facts and issue an order under Sec. 41-B, hav-  
ing been heard at 10:00 o'clock a.m. on July 7, 1954,  
and due notice having been given by mail to Walter  
C. Durst, the assignee for the benefit of the creditors  
of the above named debtors, and after hearing Al-  
fred Siemon, of the law firm of Siemon & Siemon,  
attorneys for the trustee, in favor of the petition,  
and said Durst in propria persona, in opposition  
thereto,

Now upon the petition of said trustee, and the  
answer of said Durst, and all the proceedings had  
before me at said hearing, and upon the Referee's  
certificate of facts under Sec. 41B, dated July 7,  
1954, it is

Ordered that Walter C. Durst, the above named  
assignee, be, and he hereby is, required to appear  
before Ernest A. Tolin, Judge of the above entitled  
court, at Room 231, Federal Building, 312 North  
Spring Street, Los Angeles, California, on the 26  
day of July, 1954, at 10 o'clock a.m. to show cause

why he should not be adjudged in contempt by reason of the facts certified in said certificate, and why he should not then and there be committed to prison or otherwise dealt with until he shall obey the lawful order of Benno M. Brink, Referee in Bankruptcy in these proceedings dated June 15, 1954; and it is further

Ordered that service of this order shall be deemed sufficient if a copy thereof and of the certificate dated July 7, 1954 be served on said Walter C. Durst on or before the 16 day of July, 1954.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy

Return on Service of Writ attached.

[Endorsed]: Filed July 21, 1954.

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[Title of District Court and Causes 60963-4.]

PETITION BY ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR AUTHORITY TO EMPLOY COUNSEL AT THE EXPENSE OF THE GENERAL ASSIGNMENT

To the Honorable Ernest A. Tolin, Judge of the United States District Court:

The petition of Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff respectfully represents and shows:

## I.

That ever since the 25th day of November, 1949, petitioner has been and, subject to the effect of an order of June 15, 1954 herein, on review, still is, the assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, by virtue of recorded general assignment, recorded deeds, recorded bill of sale, recorded crop mortgages, and other unrecorded documents and agreements creating such trust known as general assignment (common law.), by virtue of which petitioner is a trustee, the primary beneficiaries of the trust are the creditors for whose benefit the trust was created, and the resulting beneficiaries being the debtors herein, who will participate in any residue after the payment of the creditors and the expenses of administration of the general Assignment.

## II.

That the creditors and petitioner are defendants in Los Angeles Superior Court Action filed by the debtors as plaintiffs April 23, 1953, being No. Transferred to Los Angeles SFC 914, and which as to your petitioner has been at issue since November 20, 1953, by answer filed that day in propria persona.

## III.

That the within debtor proceedings were filed by the debtors in propria persona to avoid pending foreclosures of the two ranches which the debtor have been operating for the general assignment for

four years by written agreement as the agents of the assignee for the benefit of creditors.

#### IV.

That the aforesaid order of June 15, 1954, entered after a hearing on June 9, 1954, in which your petitioner appeared in propria persona, being in the opinion of your petitioner a premature and void order under the provisions of Section 475 of the Bankruptcy Act as no plan of Arrangement has been confirmed. Your petitioner in propria persona reviewed said order on the day he was ordered to convey and release the assets of the general assignment. Whereupon petitioner appeared in propria persona on July 7, 1954, and his acts and conduct were cited to the District Judge.

#### V.

In the event of a judgment in the State Court requiring petitioner to sell the assets and pay the creditors the said order of June 15, 1954, could make it impossible to respond to said State Court Judgment, possibly causing great and irreparable damage to the creditors of the general assignment. Furthermore the debtors employed counsel herein and on or about May 26, 1954, filed amended schedules herein where allegedly the creditors of the general assignment are listed in schedule 3a Unsecured creditors.

#### VI.

That is necessary in view of the proceedings had herein and for the preservation of the general as-



signment, and the protection of the assets and the interest of the creditors for whose benefit same was created, and the protection and preservation of all contractual rights heretofore entered into, that counsel Morris Lavine, who has been employed, be approved by the Court, and designated as counsel for the assignee, with court approval. Petitioner has already had the benefit of the services and advice of attorney Morris Lavine as such counsel, who has agreed to accept as compensation for any services rendered to your petitioner such amount as may be allowed from time to time therefor by this Court.

Wherefore your petitioner prays that he be authorized and directed to employ counsel at the expense of the general assignment.

/s/ WALTER C. DURST,

Assignee for the Benefit of the Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

Duly Verified.

[Endorsed]: Filed July 22, 1954.

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[Title of District Court and Causes 60963-4.]

**ORDER APPOINTING ATTORNEY FOR THE  
ASSIGNEE FOR THE BENEFIT OF  
CREDITORS**

It appearing that Walter C. Durst is the assignee for the benefit of creditors of Jack P. Kalpakoff

and Mary Kalpakoff. That on the 15th day of June, 1954, the court made an order to convey and release all the assets of the general assignment;

It appearing that Walter C. Durst appeared in such matter in propria persona, and that he has been cited to show cause in contempt for not complying with the order;

It appearing to the Court that Walter C. Durst, in his capacity as assignee for the benefit of creditors requires counsel, now therefore,

It Is Ordered that Morris Lavine, Esquire, be, and he is hereby, appointed at the expense of the estate included in the general assignment for the benefit of creditors, to serve as attorney for Walter C. Durst in his capacity as assignee for the benefit of creditors in all matters related to the trust created under such general assignment.

Dated this 22 day of July, 1954.

/s/ ERNEST A. TOLIN,

Judge of the U. S. District Court

[Endorsed]: Filed July 22, 1954.

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[Title of District Court and Causes 60963-4.]

PETITION FOR ORDER SETTING ASIDE  
ORDER OF GENERAL REFERENCE

To the Honorable Ernest A. Tolin, Judge of the  
United States District Court:

The petition of Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff

and Mary Kalpakoff, respectfully represents and shows:

I.

That there have been several matters set before the Hon. Judge Ernest A. Tolin, for hearing on July 26, 1954, at 10:00 o'clock in the above entitled debtor estates to wit:

1. An order to show cause why Walter C. Durst should not be held in contempt.
2. Opposition to a real property plan of arrangement now proposed by the debtors.
3. Plan of arrangement proposed by the assignee.
4. The appointment of counsel for the assignee.
5. The consolidation of the cases.
6. A petition on behalf of the assignee to file one claim for all creditors of the general assignment.
7. Petition for review has been filed and is pending involving the same subject matter.

II.

That in the opinion of the petitioner the issues raised by the petition for review herein from the order of June 15, 1954, made and entered herein by the referee, are of such a nature, that in the interest of avoiding a multiplicity of suits, and a duplication of judicial work, the order of general reference heretofore made and entered herein, should be set aside and all matters pending before the referee be transferred to this Honorable Court in the interest of justice, and that the hearing now set for July

28, 1954, before the referee be transferred to the calendar of the District Judge.

Wherefore your petitioner prays that this court make its order that the general reference heretofore made be set aside and all matters pending or hereafter arising be transferred to this court for further hearing before this Honorable Court and the District Judge thereof.

/s/ WALTER C. DURST,

Assignee for the Benefit of Creditors

This petition will be heard September 13, 1954, at 10 a.m.

/s/ ERNEST A. TOLIN, Judge

[Endorsed]: Filed July 22, 1954.

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[Title of District Court and Causes 60963-4.]

### SPECIAL APPEARANCE

Proceedings on an Order to Show Cause Why Assignee Should Not Be Held For Contempt in a Chapter XII Proceeding; Denial of Acts Constituting Contempt; Challenge to Order as Null and Void; Opposition to Proposed Plan of Arrangement.

Comes Now Walter C. Durst, as Assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, and in response to the Order to Show Cause Why he, as

assignee for the benefit of the creditors, should not be adjudged in contempt of the Order of the Referee in Bankruptcy and committed until he obeys the said order, respectfully responds that he is not guilty of contempt. He further responds that (1) he has committed no act for which he would be punished or held in contempt; (2) that the order of the Referee in Bankruptcy is null and void and therefore not subject to an order of contempt.

In respect thereto he sets forth as follows:

### The Facts

#### I.

On November 25th, 1949, Jack P. Kalpakoff and his wife, Mary Kalpakoff, who were represented by Attorney Philip M. Schwabacher, attorney-at-law, with offices in Lancaster, California, and fully advised at that time by said attorney, executed a General Assignment for the benefit of creditors (common law) naming this respondent as the Assignee. That at that time the Kalpakoffs had suffered heavy losses during the year 1949 in their crop in a potato venture with one John Chernabaeff. There was at that time a large payment due on December 1st, 1949 on Kalpakoff's 240-acre ranch at Rosamond, in Kern County, California; creditors who had performed labor and sold materials in the development of the ranch and the leveling of the land, the installation of a well and installation of pipes on approximately 120 acres were threatening legal action, and the Los Angeles Production Credit Association was also threatening foreclosure on Kalpakoff's

160-acre ranch at Lancaster, Los Angeles County, California. Mr. Kalpakoff stated that he wanted to remain in possession of the land for the purpose of farming it and to keep these creditors from selling him out so that farming could continue, the crops could be sold, and provide a fund from which he believed the creditors could be paid in full. With the advice of Mr. Schwabacher he chose the Common Law Assignment for the benefit of Creditors to carry on.

## II.

Pursuant to the general assignment, Mr. and Mrs. Kalpakoff delivered all of their assets to the assignee for the benefit of the creditors and conveyed the same by appropriate instruments of conveyance in conformity with applicable law of general assignments to make the instruments valid. They remained in possession under an agreement as the assignee's agents.

## III.

The general assignment was recorded in Book 31667, Page 84, in the Official Records of Los Angeles County, being Exhibit "A" attached to this Order in Response. Agreement re Assignee's Fees is Exhibit A-1 Attached hereto.

## IV.

Deeds to three city parcels and Los Angeles County ranch were recorded in Book 31667, Page 86 of the Official Records of Los Angeles County, California, on December 7, 1949.

V.

The deed to the Kern County land, consisting of 240-acres at Rosamond, was recorded in Book 1804, Page 146, Official Records of Kern County, California, on May 3, 1951.

VI.

A Bill of Sale was recorded in Book 35500, Page 235, Official Records of Los Angeles County, California, on February 6, 1951.

VII.

A promissory note for \$95,000.00, being the total of the then indebtedness of the Kalpakoffs, was delivered to the assignee, as were an agreement designating the Kalpakoffs as the agents of the assignee and respecting the possession of the assets of the General Assignment and agreement respecting fees of the assignee for his services.

VIII.

A crop mortgage on Los Angeles County land was recorded in Book No. 31167, Page 78, Official Records of Los Angeles County, California, on December 7, 1949.

IX.

A crop mortgage on the Kern County land was recorded in Book No. 2044, Official Records, Kern County, California, on February 24, 1953.

X.

The aforesaid assignments conveyed an absolute and irrevocable trust in the assignee, your petitioner herein, for the benefit of creditors.

## XI.

Notice was given to each and all of the creditors, pursuant to applicable law. There were no objecting creditors.

## XII.

Jack P. Kalpakoff and Mary Kalpakoff have proceeded under this assignment for the benefit of creditors rather than bankruptcy on a proposal by John Chernabaeff, the largest creditor, by which proposal the assignee is informed and believes Mr. Chernabaeff was to receive a deed to Rosamond, Kern County 240-acre ranch, and permit Mr. Kalpakoff to work on the ranch and if at the end of three years he was in a position to repay John Chernabaeff in full, Mr. Kalpakoff would receive back the deed to the ranch, and a proposal from the Los Angeles Production Credit Association, the holder of the second deed of trust on the Lancaster land, 160-acre ranch then in default, that as the assignee is informed and believes, Mr. and Mrs. Kalpakoff deed that ranch to the association and if, during a specified period of time, Kalpakoff was able to repay the association, he would receive back a deed to the ranch.

## XIII.

The general assignment for the benefit of creditors given to the Assignee, Walter C. Durst, would have constituted an act of bankruptcy under Section III(4), Title Eleven, Chapter 3, Section 21 of the Bankruptcy Act, and, except for the fact that the Kalpakoffs are farmers, a petition could have been filed at any time within four months after the com-



mission of the act of bankruptcy to declare Mr. and Mrs. Kalpakoff bankrupt. The creditors who were all placed upon notice elected to along with the common law assignment for the benefit of creditors, and did not protest.

## XIV.

Thereafter, pursuant to the general assignment and the contracts therein entered, their assignee has proceeded for the past five years to carry out his duties; he has reduced the incumbrance holder and equipment contract indebtedness on both ranch properties from approximately \$70,000 to about \$45,000. He entered into obligations with the consent of the debtors for the benefit of the creditors and others as follows:

(A) "Obligations have been contracted, with the consent of the debtors, for the benefit of the creditors and the debtors, to the best of my knowledge, about as follows: A. V. Hay Growers Association, \$357.80, Associated Telephone Co., \$80.02, Bank of America, Lancaster, plus interest, \$205.00, Director of Internal Revenue, plus charges and interest, \$842.91, Walter C. Durst, advances \$777.58, John French \$56.67, Harris Store, \$164.67, H. W. Hunter, \$302.93, Abraham P. Kalpakoff, \$1,500.00, George J. Kalpakoff, \$350.00, Jack J. Kalpakoff \$80.00, John Kalpakoff \$500.00, Paul Kalpakoff \$200.00, Mary William Kalpakoff, \$100.00, William Kalpakoff, plus interest, \$3,062.11, William Kalpakoff and John Chernabaeff, \$105.00, Fred Kraft, \$58.85, L. A. Daily Journal, \$58.30, McGowan & Swan, \$55.14, Newell & Co., \$123.02, and \$478.56,

Milan A. Pond, \$50.00, Robertson Implement Co., \$30.00, John Samaduroff, \$500.00, P. M. Schwabacher, \$38.90, Chas. F. Siebenthal, \$108.77, So. Calif. Water Co., \$3.88, Westside Farmer's Supply Co., \$16.50; P. Bonnafus, \$25.00, Paul W. K. Hairgrove, \$50.00, George J. Kalpakoff \$125.00, Gregory Kalpakoff, \$375.00, John J. Kalpakoff, \$125.00, Paul F. Kalpakoff, \$100.00, John Nazareff, \$25.00, Bill Samaduroff, \$125.00, which apparently total approximately \$11,156.61.

(B) "Prior secured creditors existing when I took the general assignment November 25, 1949 are as follows: J. Perry Brite, plus interest \$1,972.21, Lysle Greenman, plus interest \$18,000.00, Los Angeles Production Credit Association, plus interest \$19,773.12, Peerless Pump Division plus interest \$2,028.20, Pomona Pump Sales plus interest, \$173.60, Shepherd Tractor and Equipment Co., \$2,187.14, Standard Oil Co., \$32.00, making a total of approximately \$44,166.27.

(C) "That the debts for the payment of which I took the general assignment have not been paid as follows: Fred A. Alley Co., \$215.03, Antelope Valley Pest Control Co., \$75.00, Mike J. Bolotin, \$200.00, Dr. Hugh C. Bryan, \$3.00, Dr. Craig B. Byrne, \$8.00, California Farm Supply Co., \$171.00, Don Campbell Electric, \$6.91, John Chernabaeff, \$8,863.12, W. O. Coleman, \$2,300.00, Cuthrie Collins, \$.25, Del R. Combs, \$407.82, Dr. L. M. Cowell, \$8.00, Dent Dustin, \$51.00, John Evdakimoff, \$410.40, Robert W. Fugitt, D.D.S., \$4.00, General Petroleum Corp., \$704.50, Joe Goddle, \$150.00, Guarantee In-

insurance Co., \$126.14, Hayward Lumber & Inv. Co., \$276.64, Dr. George A. Johnstone, \$3.00, George J. Kalpakoff, \$100.00, Jack J. Kalpakoff, \$1,100.00, John J. Kalpakoff, \$1,400.00, Paul F. Kalpakoff, \$600.00, Paul P. Kalpakoff, \$100.00, H. E. Kicenske, M.D., \$33.00, John M. Krauss, M.D., \$10.00, Lincoln Medical Pharmacy, \$11.50, Martinez Brothers, \$2,667.20, McGowan & Swan, \$4,265.33, Nunz Bros., \$122.91, Pickus Bros. Repair Service, \$14.88, Richfield Oil Corp. \$39.52, Rottman Drilling Co., \$299.20, Bill Samaduroff, \$500.00, John Samaduroff, \$500.00, Robert J. Schillinger, M.D. \$20.00, P. M. Schwabacher, \$2,169.00, John Selznoff, \$300.00, W. R. Senseman, M.D., \$3.00, Charles F. Siebenthal \$290.42, Standard Oil Co., \$221.29, Suburban Gas Service \$10.46, Valley Tire Shop, \$47.57, San Volkoff, \$250.00, Westside Farmers Supply Store, \$338.26, Westside Service, \$22.65, Al Wren, \$105.00, Jerry R. Young, \$55.50, apparently totalling approximately \$31,537.17.

### XV.

During the first year of the general assignment the gross receipts were approximately \$21,708.81, including the 1950 production of the Lancaster ranch of approximately \$11,416.81, and from which approximately \$13,949.30 was paid to secured creditors, and the assignee paid himself \$787.43; the second year gross receipts were approximately \$31,988.20, including the 1951 production of the Lancaster Ranch of approximately \$15,608.55, of which approximately \$20,476.54, was paid to secured creditors and the assignee paid himself the sum of

\$625.00; the third year gross receipts were approximately \$31,951.88, including the 1952 production of the Lancaster ranch of approximately \$17,780.96, of which approximately \$14,671.42 was paid to secured creditors and the assignee paid himself \$735.00; the fourth year gross receipts were approximately \$8,383.45, of which approximately \$11,934.58 was paid to secured creditors, and the assignee paid himself \$200.00. During the first three years the assignee, on the advice of creditors, leased the Kern County ranch, but during 1953 the debtors attempted to operate both ranches, meanwhile the alfalfa beds on the Lancaster ranch were depleted.

#### XVI.

The defaults of the trust deed holders were cured by December 1st, 1952. However, after three years, the general creditors having received no money became dissatisfied and urged the sale of at least one ranch to pay the obligations; they had in good faith relied upon the assignment for the benefit of creditors and had consented and agreed to rely upon the general assignment, and had therefore taken no legal action within the statutory time upon their claims. During all of this time the assignee dealt under his trust powers at arm's length with the assignor, the debtors. .

#### XVII.

Walter C. Durst, as assignee, had the debtors' written approval to sell the property and, in 1953, started and negotiated a sale of the Kern County property for the sum of \$70,000.00 to Dr. John

C. Siemens, in order to make disbursements to the general creditors. This was his legal duty (See American Jurisprudence on Assignment for the benefit of creditors.)

### XVIII.

In order to block this sale, suit was filed (in 1953) in the Superior Court of the State of California, being action No. S.F.C. 914, Transferred to Los Angeles in the Superior Court of the State of California in and for the County of Los Angeles, in which Jack P. Kalpakoff and Mary Kalpakoff, as plaintiffs, sought, and are seeking, to set aside the general assignment and the cancellation of all supporting documents, and filed *les pendens* in the recorder's office, thus clouding the assignee's title and blocking the proposed sale. That suit is now at issue and has not been tried, and involves the identical subject matter involved in these proceedings, and has for its main purpose the prevention and blocking of the sale by the assignee of the properties herein involved, or one of them, to pay off the creditors for whose benefit the assignee took the assignment.

### XIX.

On April 28th, 1954, Jack P. Kalpakoff and Mary Kalpakoff, debtors, filed a Petition under Chapter XII of the Bankruptcy Act, alleging that they had an equitable interest in the properties assigned for the benefit of creditors and, later, proposing a Plan of Arrangement by which they proposed to cancel the general assignment for the benefit of creditors and all instruments in connection therewith, and to

take possession of the properties heretofore assigned. Its purpose was to stop foreclosure sale of the ranch properties.

No hearing has been had upon the confirmation of the said Plan and no confirmation has been had of the Plan thus proposed, and no determination has been made by the Court that it is satisfied that the provisions of Chapter XII have been complied with or that the plan is for the best interest of creditors and is feasible, or that the debtors have not been guilty of any of the acts, or failed to perform any of the duties which would be a bar to the discharge in bankruptcy, or that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by the Bankruptcy Act; nor that all payments made or promised by the debtors, or by any person issuing securities or acquiring property under the arrangement, or by any other person, for services and for costs and expenses in, or in connection with, the proceedings, or in connection with and incident to the arrangement have been fully disclosed to the court and are reasonable, or if to be fixed after confirmation of the arrangement will be subject to the approval of the court. (See Chapter XII Bankruptcy Act.) After such hearing and confirmation, Section 475 of the Bankruptcy Act permits the Court to Order appropriate instruments to be executed.

## XX.

Without such hearing and opportunity to object, and without notice to the creditors, and without con-

firmation of the plan, the Referee in Bankruptcy, on June 15th, 1954, issued an Order to the Assignee requiring and directing him to assign and convey the two ranch properties and all other property in his possession; that in addition to the two ranch properties, the assignee as of such date had less than \$100.00 in his possession for the benefit of such creditors.

The Order of June 15th, 1954, directed the assignee to

“transfer and convey unto said Trustee (in bankruptcy) all of your right, title and interest in and to the real and personal property hereinafter particularly described,”

and to

“forthwith deliver to the Trustee full and complete satisfaction of the promissory note in the principal sum of \$90,000.00 and of the mortgage or mortgages of crops to be grown on the above described real properties executed by the debtor to you, as Assignee for the benefit of creditors, on or about November 25, 1949, as security for the payment of said note, with proper references in said releases and satisfactions reciting the dates and places of recordation of each of said crop mortgages.”

The order further provided that:

“Compliance with the above Order is directed and may be made by you by delivery of duly executed conveyances and releases and satisfactions to this Court in the name of and for said Trustee within the time above stated.” (an ex-

act copy of the order is attached herewith and made a part hereof, as Exhibit "B").

Said order is null and void as not in compliance with Section 475 of the Bankruptcy Act, since no Plan of Arrangement has been heard on notice, nor confirmed, and until a Plan is heard and confirmed the Referee was, and is, without jurisdiction to make the order.

### XXI.

Walter C. Durst, as Assignee for the benefit of the creditors, addressed Honorable Benno M. Brink re Kalpakoff Debtors' Estate Nos. 60963-T and 60964-T, declining to carry out the aforesaid orders and set forth that:

"I am in this thing in a trust capacity. I am not a free agent. I have a duty both to the creditors and the debtors. I took it for the creditors' benefit. The creditors decline to release me."

And, after setting forth the various claims, he set out:

"I believe my primary duty is to the creditors, and the debtors' rights come in only after the creditors claims have been satisfied. I am in litigation in the state court, and it took jurisdiction first and I am going to have to comply with its judgment, including a judgment not to convey to the debtors, but to sell for the benefit of the creditors.

The jurisdiction of the referee extends to the making of an order confirming a plan of arrangement which will be binding on my prim-



ary beneficiaries and likewise on the debtors, and I will be delighted to comply because that order will be binding on all parties including the debtors, the creditors, and will, incidentally, enjoin the state court from further proceedings.

Upon such an order I will be happy to convey and release to the Trustee or other person designated by the court to carry out the plan of arrangement.

Thank you again for the help you have given me.

Most respectfully,

Walter C. Durst,

Assignee for the benefit of the creditors of the  
Jack P. Kalpakoff and Mary Kalpakoff Gen-  
eral Assignment."

(An exact copy of the letter of Walter C. Durst to the Referee is attached hereto and made a part hereof, as Exhibit "C".)

## XXII.

The said Walter C. Durst, on April 23, 1954, also took a Petition for Review of the Referee's Order to the District Court of the United States, and such a petition acted as a stay and removed jurisdiction from the Referee to make any order with reference thereto.

## XXIII.

On July 7, 1954, the Referee in Bankruptcy certified an Order to the District Court of the United States to show cause why Walter C. Durst

should not be held in contempt of court for disobeying his order. (A copy of said Order being in the files hereof, is made a part hereof as fully as though set out in this response.)

The respondent herein, Walter C. Durst, respectfully responds that, under the foregoing facts, he was not and is not in contempt and is not required to obey the order of the Referee in Bankruptcy and the order to show cause should be discharged for the following reasons:

1. The order was and is void and a nullity for the reason that the Referee has no jurisdiction to make such an order until a Plan of Arrangement has been confirmed, as required by Section 475 of the Bankruptcy Act. (11 U.S.C. 875). That before the Referee can make an Order it is necessary for him to hold a hearing to determine whether a proposed Plan of Arrangement can and should be confirmed, after notice to the creditors and a chance by the creditors and all parties in interest to object to such a proposed plan of arrangement.

No plan has been confirmed. Presently, objections have been made to the Proposed Plan as not feasible, and another Plan has been submitted by the Assignee.

Upon a hearing to determine whether any plan should be confirmed or the proposals dismissed, your respondent will show that the proposed plan of the debtor is against the best interests of the creditors; that, in fact, the creditors have relied upon the gen-

eral assignment for the benefit of creditors to forego their right to bring suit within the statutory time fixed by the Statute of Limitations and that the claims of several of them would therefore be wiped out with no possibility of legal redress; that they will show that there is a valid, binding contract between them and the assignee for whose benefit the assignment was taken; they will show that they would be highly and greatly prejudiced and payment of their claims (now several years old) would be further delayed; they have now waited for years for the payment of their money, relying upon the general assignment. They will further show that the proposed plan of the debtor is not in good faith, but is solely for the purpose of preventing the sale of one or more of the ranch properties to pay off the long overdue indebtedness and to allow them to continue to remain in possession of the property which they have now remained in possession of for almost five years since the commencement of these proceedings, and at a time when the incumbrance holders and equipment contract creditors could have foreclosed on their property, and that in this respect the proposed plan would be inequitable and against the best interests of the creditors.

There now being no confirmation of the arrangement, as required by Section 475 of the Bankruptcy Act, the Court was without jurisdiction to direct the Assignee to execute and deliver the instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed.

Jurisdiction of the Referee to make the order in question does not vest until after an arrangement has been confirmed, after notice and hearing by the creditors—none of which has been had.

Confirmation of a plan must receive a full hearing, as provided by Section 471 of the Bankruptcy Act. Without notice and without a hearing on the proposed Plan of Arrangement for the purpose of confirmation, the proceedings would be in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and a nullity.

*Sylvan Beach vs. Koch*, 140 Fed. 2d 852, at 861:

“In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity. *Galpin vs. Page*, 85 U. S. 350, 18 Wall. 350, 368, 369, 21 L.Ed. 959; *Windsor vs. McVeigh*, 93 U.S. 274, 277, 278, 23 L.Ed. 914; *Coe vs. Armour Fertilizer Works*, 237 U.S. 413, 423, 35 S.Ct. 625, 59 L.Ed. 1027; *Twining vs. State of New Jersey*, 211 U.S. 78, 110, 111, 29 S.Ct. 14, 53 L.Ed. 97; *Ochoa vs. Hernandez*, 230 U.S. 130, 161, 33 S.Ct. 1033, 57 L.Ed. 1427; *Postal Telegraph Cable Co. vs. City of New Port*, 247 U.S. 464, 476, 38 S.Ct. 566, 62 L.Ed. 1215; *Truax vs. Corrigan*, 257 U.S. 312, 332, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375; *Gentry vs. United States*, 8 Cir. 101 F. 51; *In re Rosser*, 8 Cir., 101 F. 562, 567, 570; *In re Noell*, 8 Cir., 93 F. 2d 5, 6, 7.”

In re American Bantam Car Co., 193 F.2d. 616, at 621, the court said:

“Unless notice be given as required by the bankruptcy act, the court lacks the power to enter a valid order in the premises.”

Until there has been a hearing on a plan of arrangement, after notice to all of the creditors and a confirmation thereof, the Referee in Bankruptcy lacked jurisdiction to make the order and the order was a nullity. No contempt is committed in refusing to obey a void order.

2. The order was and is a nullity also for the reason that the debtors actually do not have, and have not shown to have, any “equitable interest” in the real property involved, except as resulting beneficiaries, and therefore are improperly in a Chapter XII proceeding. Having, by their general assignment for the benefit of creditors, conveyed all of their assets to the assignee for the benefit of the creditors, they have created an irrevocable trust and conveyed all of their property to the assignee for the benefit of creditors and thus, until it is shown that all of the debts have been fully paid, that all the creditors are paid in full pursuant to the assignment, the assignor retains no interest whatsoever in the properties thus assigned and the allegations of equitable interest therein are incorrect as a matter of law.

The right to set aside such assignment of property transferred by such assignment almost five

years prior to the petition, and under which the creditors have been relying in good faith upon the general assignment, does not exist under applicable law.

3. The debtors, in fact, have no equitable interest and can have none until the terms of the general assignment for the benefit of the creditors is carried out and it is shown that there is a balance left. The only interest that the debtors had in this property was an agreement that they may remain in possession and farm it. This does not entitle them to proceed under Chapter XII.

4. The debtors have selected the state court forum first; they selected it to bring a plenary suit to set aside their general assignment. That suit is now pending. The state courts have taken first jurisdiction—the federal courts have no jurisdiction or right to interfere.

5. The debtors have not offered to do equity as required by equitable principles on which bankruptcy court are governed. To do equity, each of the creditors should be paid in full and all contractual rights agreed upon by the general assignment and in connection therewith should be carried out. Any proposal or plan carries a duty to the creditors and to the assignee for their benefit. Any proposal should require the creditors to release the assignee for their benefit and to release the assignee from any judgment in the state court which took jurisdiction first, and to comply with its judgment including a judgment not to convey to the debtors but to sell for the benefit of creditors, which may

be determined in that action, and to release the assignee from all obligations resulting from the contracts entered into by all the parties, in 1949.

6. The Trustee William Chernabaeff who has been appointed is a relative of the debtors and not a disinterested Trustee.

7. The debtors are estopped by their acts and their conduct in seeking the setting aside of the assignment for the benefit of creditors after nearly five years of operation under it, and after reliance by the creditors upon such acts and such conduct. Laches has set in. If they wished to set it aside, they had to act within a reasonable time.

8. A petition for review stays the Order of the Referee and he is without jurisdiction to certify a contempt proceeding until the matters set out in the Petition for Review are decided by the United States District Court.

Wherefore, respondent, Walter C. Durst prays that this Honorable Court discharge the Order to Show Cause, and that he order the payment of all costs out of the estate and assets of the debtors, including attorneys fees and expenses for the said assignee.

/s/ MORRIS LAVINE,

Attorney for Assignee Appearing  
Specially

[Printer's Note: Exhibit A, General Assignment and A-1, Agreement re Fees are set out as Exhibits B and C at pages 14-17.]

## EXHIBIT "C"

Law Offices Walter C. Durst, 639 S. Spring St.,  
Los Angeles, Calif.

(Copy)

July 7th, 1954

Honorable Benno M. Brink, Referee in Bankruptcy  
327 Federal Building, 312 North Spring Street,  
Los Angeles 12, California.

Re: Kalpakoff Debtor Estates, Nos. 60963-T  
and 60964-T.

Honorable Sir:

I am in this thing in a trust capacity. I am not a free agent. I have a duty both to the creditors and the debtors. I took it for the creditors' benefit. The creditors decline to release me.

Prior secured creditors existing when I took the general assignment November 25, 1949, are as follows: J. Perry Brite, plus interest, \$1972.21, Lysle Greenman, plus interest \$18,000.00, Los Angeles Production Credit Association, plus interest \$19,773.12, Peerless Pump Division, plus interest \$2,028.20, Pomona Pump Sales plus interest, \$173.60, Shepherd Tractor and Equipment Co., \$2,187.14, Standard Oil Co., \$32.00, making a total of approximately \$44,166.27.

Obligations have been contracted, with the consent of the debtors, for the benefit of the creditors and the debtors, to the best of my knowledge, about as follows: A. V. Hay Growers Association, \$357.80, Associated Telephone Co. \$80.02, Bank of America, Lancaster, plus interest, \$205.00, Director of Internal Revenue, plus charges and interest, \$842.91,



Walter C. Durst, advances, \$777.58, John French, \$56.67, Harris Store, \$164.67, H. W. Hunter, \$302.93, Abraham P. Kalpakoff, \$1,500.00, George J. Kalpakoff, \$350.00, Jack J. Kalpakoff, \$80.00, John Kalpakoff, \$500.00, Paul Kalpakoff, \$200.00, Mary William Kalpakoff, \$100.00, William Kalpakoff, plus interest, \$3,062.11, William Kalpakoff and John Chernabaeff, \$105.00, Fred Kraft, \$58.85, L. A. Daily Journal, \$58.30, McGowan & Swan, \$55.14, Newell & Co., \$123.02, and \$478.56, Milan A. Pond, \$50.00, Robertson Implement Co., \$30.00, John Samaduroff, \$500.00, P. M. Schwabacher, \$38.90, Chas. F. Siebenthal, \$108.77, So. Calif. Water Co., \$3.88, Westside Farmer's Supply Co., \$16.50, P. Bonnafaus, \$25.00, Paul W. K. Hairgrove, \$50.00, George J. Kalpakoff, \$125.00, Gregory Kalpakoff, \$375.00, John J. Kalpakoff, \$125.00, Paul F. Kalpakoff, \$100.00, John Nazareff, \$25.00, Bill Samaduroff, \$125.00, which apparently total approximately \$11,156.61.

That the debts for the payment of which I took the general assignment have not been paid as follows: Fred A. Alley Co., \$215.03, Antelope Valley Pest Control Co., \$75.00, Mike J. Bolotin, \$200.00, Dr. Hugh C. Bryan, \$3.00, Dr. Craig B. Byrne, \$8.00, California Farm Supply Co., \$171.00, Don Campbell Electric, \$6.91, John Chernabaeff, \$8,863.12, W. O. Coleman, \$2,300.00, Cuthrie Collins, \$.25, Del R. Combs, \$407.82, Dr. L. M. Cowell, \$8.00, Dent Dustin, \$51.00, John Evdakimoff, \$410.40, Robert W. Fugitt, D.D.S., \$4.00, General Petroleum Corp., \$704.50, Joe Goddle, \$150.00, Guarantee

Insurance Co., \$126.14, Hayward Lumber & Inv. Co., \$276.64, Dr. George A. Johnstone, \$3.00, George J. Kalpakoff, \$100.00, Jack J. Kalpakoff, \$1,100.00, John J. Kalpakoff, \$1,400.00, Paul F. Kalpakoff, \$600.00, Paul P. Kalpakoff, \$100.00, H. E. Kicenske, M.D., \$33.00, John M. Krauss, M.D., \$10.00, Lincoln Medical Pharmacy \$11.50, Martinez Brothers, \$2,667.20, McGowan & Swan, \$4,265.33, Nunz Bros., \$122.91, Pickus Bros. Repair Service, \$14.88, Richfield Oil Corp. \$39.52, Rottman Drilling Co., \$299.20, Bill Samaduroff, \$500.00, John Samaduroff, \$500.00, Robert J. Schillinger, M.D., \$20.00, P. M. Schwabacher, \$2,169.00, John Selznoff, \$300.00, W. R. Senseman, M.D., \$3.00, Charles F. Siebenthal, \$290.42, Standard Oil Co., \$221.29, Suburban Gas Service, \$10.46, Valley Tire Shop, \$47.57, San Volkoff, \$250.00, Westside Farmers Supply Store, \$338.26, Westside Service, \$22.65, Al Wren, \$105.00, Jerry R. Young, \$55.50, apparently totalling approximately \$31,537.17.

I believe my primary duty is to the creditors, and the debtors' rights come in only after the creditors claims have been satisfied. I am in litigation in the state court, and it took jurisdiction first and I am going to have to comply with its judgment, including a judgment not to convey to the debtors, but to sell for the benefit of the creditors.

The jurisdiction of the referee extends to the making of an order confirming a plan of arrangement which will be binding on my primary beneficiaries and likewise on the debtors, and I will be delighted to comply because that order will be bind-

ing on all parties including the debtors, the creditors, and will, incidentally, enjoin the state court from further proceedings.

Upon such an order I will be happy to convey and release to the Trustee or other person designated by the court to carry out the plan of arrangement.

Thank you again for the help you have given me.  
Most respectfully,

WALTER C. DURST,

Assignee for the benefit of the creditors of the Jack  
P. Kalpakoff and Mary Kalpakoff General Assignment

WCD—d.

Duly Verified.

[Endorsed]: Filed July 26, 1954.

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[Title of District Court and Causes 60963-4.]

REFEREE'S CERTIFICATE ON PETITIONS  
FOR REVIEW OF ORDERS REQUIRING  
ASSIGNEE TO TURN OVER PROPERTY

To the Honorable Ernest A. Tolin, Judge of the  
above entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said court, before whom the above-entitled matters are pending under orders of general reference, do hereby certify to the following.

Walter C. Durst has duly filed his identical peti-

tions for the review of identical orders made by your Referee on June 15, 1954, in the above-entitled matters, in which orders the said Walter C. Durst was required to turn over to the trustee in these proceedings the property held by him under a general assignment for the benefit of the creditors of the debtors in these matters. The said petitions for review also challenge the propriety of orders made in these proceedings on June 23, 1954, denying a stay of execution of the said orders of June 15, 1954.

#### The Proceedings

On April 28, 1954, the debtors herein filed their respective petitions under Chapter XII of the Bankruptcy Act in these matters. On June 9, 1954, William Chernabaeff was duly appointed as trustee in each of these cases and he thereafter qualified as such trustee.

On June 2, 1954, the debtors filed their respective petitions praying that the aforesaid Walter C. Durst be directed to surrender to the debtors or to the trustee in these proceedings all property held by him under an assignment for the benefit of creditors. On the same day orders to show cause were issued requiring the said Walter C. Durst to show cause why the said petitions should not be granted.

On June 9, 1954, the said Walter C. Durst filed in each of these cases a special appearance in which he alleged that the court was without jurisdiction in these proceedings to grant the relief prayed for in the aforesaid petitions.

On June 9, 1954, the matter here involved was duly heard by your Referee and at the conclusion of the hearing he overruled the aforesaid objections to jurisdiction and ruled that the aforesaid petitions should be granted. On June 15, 1954, formal orders were made and entered in each of these cases requiring the said Walter C. Durst to turn over the property here in question to the aforesaid trustee.

On June 23, 1954, the said Walter C. Durst filed his petitions for orders staying the execution of the said orders of June 15, 1954. The said petitions were denied by orders of your Referee on the same day.

It is from the said orders of June 15 and of June 23, 1954, that these identical reviews are taken.

### The Questions Presented

The questions presented by these reviews are set forth in detail in the aforesaid petitions for review, but in the opinion of your Referee, the only substantial question which is here involved may be stated as follows:

In these proceedings under Chapter XII of the Bankruptcy Act, did your Referee have jurisdiction, under Section 2(a)21 of said Act, to require the assignee for the benefit of creditors to surrender the property held by him to the trustee in these proceedings, prior to the confirmation of a plan in these matters?

### The Evidence

Thus far no transcript of the proceedings in these matters has been furnished by the petitioner on re-

view, but since no formal evidence was received, the following brief summary of such proceedings should suffice.

When this matter was called on your Referee's calendar Walter C. Durst conceded, in response to an inquiry by your Referee, that his status in these matters was that of an assignee for the benefit of creditors. Thereupon the said Walter C. Durst asked leave to offer in evidence the documents relating to his assignment, and your Referee ruled that such proof was unnecessary in view of the aforesaid admission by the said Walter C. Durst that his status was that of an assignee for the benefit of creditors. Following this, your Referee made the rulings hereinabove set forth.

#### Referee's Orders

The originals of your Referee's orders in these matters are going up with this Certificate.

#### Papers Submitted

The following papers are herewith transmitted:

1. Petition to Direct Assignee for the Benefit of Creditors to Turn Over Property, filed June 2, 1954.
2. Order to Show Cause, filed June 2, 1954.
3. Special Appearance by Respondent Walter C. Durst, filed June 9, 1954.
4. Order Requiring and Directing Assignee for the Benefit of Creditors to Deliver Property in His Possession, filed June 15, 1954.
5. Petition for Order Staying the Execution of

the Order of June 15, 1954 Respecting Conveyances and Releases with Order, filed June 23, 1954.

6. Petition for Review of Orders of June 15, 1954, and June 23, 1954, filed June 23, 1954.

Respectfully submitted this 17th day of August, 1954.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy

[Endorsed]: Filed August 17, 1954.

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[Title of District Court and Causes 60963-4.]

### OBJECTIONS AND CHALLENGE TO THE JURISDICTION OF THE COURT

Comes now Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff and respectfully objects to and challenges the jurisdiction of the Court to proceed in addition to other grounds heretofore presented, upon the following grounds, to wit:

1. The debtors have no interest in the res constituting the assets of the general assignment, Brainard vs. Fitzgerald, 3 Cal 2d 157, which could have been attached, which is under Bankruptcy Act, Section 70a(5) "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: \* \* \*" save and excepting the beneficial

interest, if any, of the debtors as resulting cestui que trust of the general assignment upon payment in full of the creditors of the general assignment and payment in full of the expenses of administration of the general assignment;

2. The interest of the debtors, if any, being only as resulting cestui que trust depends upon the result of the sale of the res of the general assignment by Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, and the payment in full of the creditors of the general assignment and the payment in full of the expenses of administration of the general assignment, which said beneficial interest as set forth in the schedules in bankruptcy appears to be substantial, passing to the trustee of these debtor proceedings;

3. The res constituting the assets of the general assignment if in custodia legis, which is not conceded, would be subject to the State Court action which first sought to obtain jurisdiction prior to the filing of these debtor proceedings.

Wherefore Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff prays that this Court Find: (1) that it lacks jurisdiction over the res constituting the assets of the general assignment; (2) that it has jurisdiction of the interest of the debtors, if any, being only as resulting cestui que trust of the general assignment depending upon the result of the sale of the aforesaid res by Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff without let or hindrance by



the debtors herein or the trustee herein, or either of them, and the payment in full by the assignee of the creditors of the general assignment and the payment in full by the assignee of the expenses of administration of the general assignment; and (3) that said interest of the debtors as resulting cestui que trust of the general assignment as set forth in the schedules in bankruptcy herein appears from the said schedules to be a substantial interest and passes to the trustee of these debtor proceedings, and that under such interest of the debtors as remains, the restraining orders should remain in full force and effect for the protection of such interest, pending and until the sale of the assets of the general assignment as aforesaid by the assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff.

/s/ WALTER C. DURST,

Assignee for the Benefit of the Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

/s/ MORRIS LAVINE

Attorney for the Assignee.

Acknowledgment of Service attached.

[Endorsed]: Filed Sept. 13, 1954.

[Title of District Court and Causes 60963-4.]

OBJECTIONS TO PETITIONS OF JACK P.  
KALPAKOFF AND MARY KALPAKOFF  
FOR REAL PROPERTY ARRANGEMENTS

Come Now, Lysle Greenman and Emma C. Greenman, Creditors of the above named bankrupts and object to the proposed real property arrangement of the above-named debtors upon the following grounds:

I.

That the Debtors' proposed real property arrangement dated May 31, 1954, is impractical and unworkable in that it relies on continuing ranch operations which have resulted in an annual operating deficit each year since prior to the year 1949 and for the further reason that there is no showing that any of the creditors will be paid by the adoption of such an arrangement.

II.

That the proposed arrangement sets forth no plan for the operation of the debtors' ranches nor for the payments of their debts.

III.

That said proposed arrangement does not state facts to show that there is any reasonable expectation that the debtors, Walter C. Durst, the debtor's Assignee for the Benefit of Creditors, nor any Trustee that might be appointed by this court would be able to:

A. Arrange for or obtain credit to carry on farming operations.

B. To pay delinquent taxes which are now in excess of Twenty Seven Hundred Fifteen Dollars (\$2,715.00).

C. To produce a marketable crop.

#### IV.

The debtors have been operating the ranches described in the schedule on file herein since November 25, 1949 under the supervision and control of Walter C. Durst, as Assignee for the Benefit of Creditors, and the value of the debtors' assets has decreased from One Hundred Fifty Thousand Dollars (\$150,000.00) on November 25, 1949 to One Hundred Thirty Three Thousand Four Hundred Dollars (\$133,400.00) as of April 28, 1954. There is nothing in the debtors' proposed arrangements to show why the value of their assets have so decreased or how their properties could be operated more advantageously merely because someone called a "Trustee" was substituted for someone called "an Assignee for Benefit of Creditors." Nothing in the proposed arrangements indicates that there would ever be any proceeds for the benefits of the debtors' estate.

#### V.

The debtors' proposed plan does not reveal:

A. What part of the land described in the schedules is in cultivation.

B. What part of said land debtors intend to bring under cultivation.

C. What the anticipated operating expenses will be.

D. Where or upon what terms the debtors propose to obtain funds with which to operate their said ranches.

E. What they propose to use as security for loans.

F. Whether it can be reasonably anticipated that there will be any net profit from the operation of said ranches.

## VI.

Neither of the schedules, nor the proposed real property arrangement reveals the true condition of the debtors' affairs. They merely show a lump sum indebtedness to Walter C. Durst, as Assignee for the Benefit of Creditors, in the total sum of Fifty Five Thousand Three Hundred Eighty Eight Dollars and Seventy Six Cents (\$55,388.76). Schedule A-1 indicates that at least Twenty Four Thousand Four Hundred Fifty Four Dollars and Thirty Five Cents (\$24,454.35) of said amount is represented by claims of unsecured creditors whose names and addresses are not given, and that Nineteen Thousand One Hundred Ninety Nine Dollars and Sixty One Cents (\$19,199.61) is for claimed commissions of Walter C. Durst, as Assignee for the Benefit of Creditors, which amount is the subject of litigation now pending in the Superior Court of the state of California.

## VII.

That the petition of Jack P. Kalpakoff and Mary Kalpakoff filed herein on April 29, 1954 shows that

the debtors are indebted for unpaid county taxes in the sum of Eighteen Hundred Seventy Two Dollars and Eighty Six Cents (\$1,872.86).

These Objectors allege upon information and belief that some of said taxes are more than five (5) years and that if something is not done toward paying them immediately the land will be sold by the tax collectors for delinquent taxes.

### VIII.

The Objectors object to the proposed property arrangement of the assignee, Walter C. Durst, upon the grounds hereinabove mentioned and upon the following grounds:

A. That the said Walter C. Durst became the Assignee for the benefit of creditors by virtue of an assignment from the debtors during the year 1949 and has ever since been in control of the debtors' properties and that each year since he has acted as assignee for the benefit of creditors he has sustained a loss.

B. That the said Walter C. Durst is not in a legal nor equitable position to question the rights of the debtors nor of these Objectors, particularly for the following reasons:

1. That he prepared the petitions under section 422 for the debtors herein, which said petition was filed herein on April 29, 1954 and that he joined in said petition by executing the same as assignee for the benefit of creditors; that he likewise prepared the original schedules for the debtors herein and if the debtors' plan of arrangement is not now

workable it was not workable when the said Durst prepared the same and was therefore a fraud upon the creditors and that by reason of said acts he is now stopped to assert any rights contrary to the rights of the debtors.

C. That it appears that the proposed plan of the said Walter C. Durst is for his individual benefit rather than for the benefit of the debtors' creditors.

D. That the Objectors are informed and believe and therefore allege that the said Durst has never obtained an offer to purchase either of the parcels of encumbered real property for the amounts which he now alleges that they are worth and that the said properties are worth only a small amount over and above the encumbrances.

E. That these Objectors have never received a payment of principal since the execution of the Trust Deed securing the debtors' note to them.

## IX.

That the Objectors have employed, George L. Hampton, Attorney at Law to represent them herein and that the said attorney should be compensated for his services at the expense of the debtors and assignees general estate.

Wherefore the Objectors pray that petitions of the debtors and of the said Durst be denied; that the restraining order be dissolved. Should the restraining order not be dissolved and should either of said plans be adopted, either in whole or in part, the Objectors pray that the Court fix a reasonable







Mary Kalpakoff, by common law General Assignment dated November 25, 1949, respectfully represents and shows:

I.

That the assets of the general assignment consist of the following described real property:

Parcel 1, Lancaster, Los Angeles County, 160-Acre Ranch, being the Northeast Quarter of Section 23, Township 7 North, Range 13 West, S.B.B.M., also that portion of the Northwest Quarter of the Southeast Quarter of Section 23, Township 7 North, Range 13 West, S.B.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning.

Parcel 2. Rosamond, Kern County, 240-Acre Ranch, being the N $\frac{1}{2}$  of NW $\frac{1}{4}$  of Section 24, Township 9 North, Range 14 West, S.B.B.M., in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management; and the NE $\frac{1}{2}$  of Section 23, Township of North, Range 14 West, S.B.B.M., in the County of Kern, State of California, according to the Official plat of the survey of said land on file in the Bureau of Land Management.

## II.

That the liabilities of the general assignment are upwards of the sum of \$106,000.00.

## III.

That the respondents Jack P. Kalpakoff and Mary Kalpakoff are the Assignor under the general Assignment and are entitled to participate in any residue remaining in said general assignment after the payment in full of the creditors of the general assignment, the payment in full of the expenses of administration of the general assignment, whereupon the said respondents as resulting cestui que trust are entitled to receive payment in distribution of all surplus remaining.

## IV.

That the respondent William Chernabaeff, trustee of these debtor proceedings has succeeded to the interest of the debtors as resulting cestui que trust.

## V.

That the debtors herein have scheduled their interest in these proceedings in their respective amended schedules being Schedule B-1 herein, as follows: "Petitioner has an undivided one-half equitable interest as a resulting cestui que trust of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment, created November 25, 1949, wherein Walter C. Durst is the assignee for the benefit of the creditors, in the lands described as follows:

The north half of the Northwest quarter of Sec-

tion 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of Section 23, Township 9 North, Range 14 West, Kern County, California \$65,000.00. The Northwest quarter of Section 23, Township 7, North Range 13, West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning. \$65,000.00.”

## VI.

That the powers of the petitioner respecting the said lands as set forth in the general assignment are as follows:

“Said assignee is to receive the said property, conduct the said business, should he deem it proper, and is hereby authorized at any time after the signing hereof by the assignor to sell and dispose of the said property upon such time and terms as he may see fit\* \* \*”

## VII.

The assignee for the crop years 1950, 1951, and 1952, did deem it proper to conduct the business during said years, but with the advent of the 1953 crop

year the assignee did not deem it proper to conduct the business, and proceeded to sell a ranch or ranches, whereupon the assignor instituted litigation in the state court to block the sale, resulting in the lands going in default in 1953 and ensuing foreclosures in 1954, necessitating these Chapter XII proceedings, being filed by the debtors.

### VIII.

Following the filing of these proceedings the assignee pursuant to the written approval of the assignor continued with the sale of the ranch or ranches, when again the assignor, the debtors here blocked said sale by instituting summary proceedings against the assignee followed by contempt proceedings to effect the same result as sought to be obtained in the aforesaid state court action.

### IX.

Creditors, whose rights are vested, demand payment. The assignor has had five years to do that which he represented he could do in one year and the further interference of the assignor in the fulfillment of the general assignment by sale and distribution as aforesaid should be restrained by appropriate order in which the trustee in these proceedings should be included.

### X.

Your petitioner since other pending matters were submitted herein September 13, 1954, has received offers totalling \$99,000.00 for the two ranches, and

petitioner without in any way waiving any of the rights of the general assignment or of the assignee heretofore reserved herein to the jurisdiction of the court to do other than protect the rights of the assignor as resulting cestui que trust and their successor the trustee in these proceedings, seeks the within order so that he may proceed with the fulfillment of the general assignment by sale of its assets without let or hindrance of any kind by the assignor, the debtors or the trustee.

### XI.

Petitioner is informed and believes and based upon such information and belief alleges that the aforesaid ranches should be sold for substantially higher sums *that* the aforesaid sum, and that upon the restraining order being granted herein it may be possible for petitioner to obtain offers for the said ranches in the neighborhood of the estimate placed thereon by the debtors aforesaid and that thereby a substantial sum may be realized for the debtors' estates herein as such resulting cestui que trust of the general assignment.

Wherefore your petitioner prays that an order be made and entered herein directed to the respondents Jack P. Kalpakoff, Mary Kalpakoff and William Chernabaeff, directing and commanding them to be and appear before this court on the day and date to be fixed therein and then and there show cause, if any they have, or either of them has why an order should not be made and entered herein

restraining the said respondents and each of them from in any manner interfering with the sale of the above described real property by the assignee for the benefit of creditors herein, in the fulfillment of the general assignment and in accordance with the powers therein granted; that service of the said order to show cause be by mail and that the time of service be shortened.

/s/ WALTER C. DURST,  
Assignee for the Benefit of Creditors of Jack P.  
Kalpakoff and Mary Kalpakoff, Petitioner.

/s/ MORRIS LAVINE,  
Attorney for Petitioner.

### ORDER TO SHOW CAUSE

Upon reading and filing the duly verified petition praying for an order to show cause directed to the respondents above set forth and good cause appearing thereby and therefrom, on motion of Morris Lavine, attorney for the assignee for the benefit of creditors; now, therefore,

It is hereby ordered that the respondents Jack P. Kalpakoff, Mary Kalpakoff, and William Chernabaeff, be and appear before this Court on Monday, the 8th day of November, 1954, at the hour of 10:00 a.m., in the Courtroom of the Honorable Ernest A. Tolin, Second Floor, Federal Building, 312 North Spring Street, Los Angeles 12, California, and then and there show cause if any they have, or either of them has, why an order should not be made and

entered herein restraining the respondents and each of them, from interfering in any manner whatsoever with the sale by Walter C. Durst, Assignee for the benefit of creditors of the above within described real property to fulfill the purposes of the general assignment by the payment of the creditors of the general assignment in full, and the payment of the expenses of the general assignment in full, and by the payment in distribution of the residue of said sales after the payment of the foregoing, to the respondent trustee as the resulting cestui que trust of the general assignment.

It is further ordered that service of this Order to Show Cause be made by mailing a copy thereof together with a copy of the petition upon which the same is based to Siemon and Siemon, attorneys for the respondents, and to the respondents, on or before October 20, 1954, and the time of service is shortened accordingly.

Dated this 18th day of October, 1954.

/s/ ERNEST A. TOLIN,  
District Judge.

Duly Verified.

[Endorsed]: Filed Oct. 19, 1954.

[Title of District Court and Causes 60963-4.]

ANSWER TO ORDER TO SHOW CAUSE  
ISSUED OCTOBER 18, 1954

Comes now the Trustee in the above entitled matters and alleges and shows:

First Answer

There is now pending in this court a citation against petitioner Walter C. Durst as assignee for the benefit of creditors to show cause why he should not be punished for contempt for failure and refusal to obey the order of the Referee to turn over the property of the debtors to the Trustee herein for administration in this Court; that the matter involved on this order to show cause is a phase or aspect of and ancillary to the pending matter relating to the contempt for disobedience of the turnover order; and that petitioner on the order to show cause has delayed, stalled and postponed decision on the principal matter while attempting to obtain indirect action by the subject order to show cause.

Second Answer

1. The petition on which the subject order to show cause was issued does not state any facts which are new or supplementary to facts already before the Court in the contempt proceeding, or any matters except conclusions and argumentative matter; that it is sham, frivolous and vexatious in that it alleges proceedings by debtors to "block" or which "blocked" unspecified and non-existent sales, admits



failure to operate during the years 1953 and 1954, attributes defaults and foreclosures occurring prior to commencement of such blocking procedures (litigation) to such litigation, falsely alleges that the existence of proceedings by him for sales were suspended by summary proceedings herein when as a matter of law, as he well knows, any possibility, proceeding or ability on his part to make a sale as Trustee was suspended by the commencement of these proceedings which he caused debtors to commence in order to avoid loss of the assigned estate due to his own default; that he fails to be specific about the alleged offers mentioned in his paragraph X; that it does not appear that said Durst is in position to accept or consider any offer, or in position to sell said properties; that it does not appear that such offers may not be general offers which may be acted upon by the Trustee, or that the Trustee may not have received the same offers; that it does not appear what debtors or the Trustee may be doing, or what act of theirs is complained of, that interferes with a sale by Durst if he has any power or right to make a sale; that it appears that the only thing which prevents him from making a sale, if he has any power or authority to make sales, is the pendency of these Chapter XII proceedings, which he admittedly commenced himself; that there is no order the Court could make on the order to show cause which would permit Durst to sell, or prevent debtors from interfering with a sale by him, except an order dismissing these proceedings; that the Court in this matter is without authority to

declare or adjudicate that he has a right to sell on an order to show cause; and that to attempt any such thing by order would amount to renunciation of jurisdiction.

2. For the reasons above alleged the petition is contemptuous, obstructive, vexatious and sham; and has no object or purpose except harass the administration of the estates of debtors, to the prejudice and disadvantage of the creditors and all concerned.

3. No ground or reason is or can be shown why sales may not be made by the Trustee under the processes of this Court to as great or better advantage to the estates as sales by the assignee; and the Trustee has had many propositions for sales on which he has not been able to act by reason of the failure of Durst to obey the turn-over order.

Therefore, your Trustee prays that the order be dismissed.

SIEMON & SIEMON,

/s/ By ALFRED SIEMON,  
Attorneys for Trustee.

Duly Verified.

[Endorsed]: Filed Nov. 8, 1954.

[Title of District Court and Causes 60963-4.]

SUPPLEMENT TO REFEREE'S CERTIFICATE ON PETITIONS for Review of Orders Requiring Assignee to Turn Over Property.

To the Honorable Ernest A. Tolin, Judge of the above entitled court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matters are pending under orders of general reference, do hereby supplement my Referee's Certificate on Petitions for Review of Orders Requiring Assignee to Turn Over Property which I filed with the Clerk of the Court in the said matters on August 17, 1954, by transmitting herewith the Reporter's Transcript of proceedings had in the said matters on June 9 and July 7, 1954.

Respectfully submitted this 10th day of November, 1954.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 10, 1954.

In the United States District Court, Southern District of California, Central Division

In Bankruptcy—No. 60,963-T and No. 60,964-T

In the Matter of JACK P. KALPAKOFF and MARY KALPAKOFF, Debtors.

### TRANSCRIPT OF PROCEEDINGS

At Hearing on Order to Show Cause, Debtors vs. Walter C. Durst, Assignee, June 9, 1954, and July 7th, 1954.

Before the Honorable Benno M. Brink, Referee in Bankruptcy.

Appearances: For the Debtors: Siemon and Siemon, by Alfred Siemon, 259 Haberfelde Bldg., Bakersfield, Calif. For the Assignee: Walter C. Durst, Assignee, in Propria Persona. For Los Angeles Production Credit Association: Floyd E. Pendell, by Walter A. Brown. For Philip M. Schwabacher; Philip M. Schwabacher, In Propria Persona. For Lysle Greenman and Emma C. Greenman: George L. Hampton. For Shephert Tractor & Equipment Co.: A. F. Mack. For Director of Internal Revenue: H. W. Vestermire.

Los Angeles, Wednesday, June 9, 1954, 10 a.m.

The Referee: Jack P. Kalpakoff and Mary Kalpakoff.

Mr. Durst: I am appearing specially as Respondent.

Mr. Alfred Siemon: Counsel for Debtors is here.

Mr. Pendell: I am appearing for Attorney Wal-

ter E. Brown, who represents the Los Angeles Production Credit Association.

Mr. Schwabacher: I am appearing in *Propria Persona*.

Mr. Hampton: I am appearing for Lysle Greenman and Emma C. Greenman.

Mr. Mack: I appear for Shepherd Tractor & Equipment Company.

Mr. Vestermire: I appear for the Director of Internal Revenue.

The Referee: As you are all advised, this is a proceeding under Chapter 12 of the Bankruptcy Act. We do not have many of these proceedings in this Court, so it may well be that you gentlemen here as attorneys may know more about the actual procedure than the Court does, and if I say something out of line I hope you will correct me immediately, so that we will not get off on the wrong start here. These are separate proceedings, as they have to be under the law, but they involve the same subject matter, namely, certain real estate, which is subject to encumbrances, and it is the desire of the Debtors to work out a Plan of Arrangement with the necessary Consents required by the Statute for the eventual satisfaction and payment of these obligations. Mr. Siemon, what do you want to do this morning?

Mr. Siemon: We have an Order to Show Cause here requiring Mr. Durst to turn over the property to the Trustee for the Debtors, which we think is essential to the successful administration of these estates. Can we have that heard first?

The Referee: Yes; and Mr. Durst has filed a Special Appearance here. This Appearance by Mr. Durst recites that:

“Respondent, without waiving any of his rights under the special appearance, invites the court to consider the following:

“(1) The appointment of an appraiser to appraise the two ranches of the debtors to determine the value of the interest of the debtors therein as resulting cestui que trust under the general assignment;

“(2) The debtors’ proposal to pay their secured creditors 100 cents on the dollar in five years from operation or sale of 160 acre and 240 acre alfalfa ranches in which debtors have an equitable interest other than the right to redeem from a sale before filing of their petitions herein.”

Well, I will hear you, Mr. Durst. I don’t understand what you want the Court to do.

Mr. Durst: I believe the authorities appended to the Special Appearance I have filed here, and the first case cited is right in point, the case is “*In Re Preas*,” on the one proposition mentioned. My time has been short and I have been heavily pressed and haven’t been able to give it the time I should have, and Mr. William J. Cusack, my attorney, is out of the jurisdiction. That case I cited has been affirmed by the Circuit Court on the matter of removal of an assignee.

The Referee: But, all you have filed here is an invitation for the Court to do something.

Mr. Durst: Yes, but it is further set forth there, and you didn’t read it.

The Referee: Paragraph one alleges "the Court is without jurisdiction to (1) summarily remove Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, or (2) require the assignee to turn over, release, reconvey and surrender to any person whomsoever, save upon fulfillment of the general assignment when the residue thereof will pass to the debtors, such title, claims, liens, assignments and conveyances, crop mortgages, or any other conveyances of any kind or character executed by Jack P. Kalpakoff and Mary Kalpakoff to Walter C. Durst, assignee for the benefit of the creditors of Jack Kalpakoff and Mary Kalpakoff, commencing with the General Assignment dated November 25, 1949, and all succeeding documents, denied by Answer filed by Walter C. Durst, in pending Los Angeles Superior Court Action No. Transferred to Los Angeles SFC 914."

The Referee: Then, this is an objection to the jurisdiction of this Court to require the Assignee for the Benefit of Creditors to turn over?

Mr. Durst: Yes.

The Referee: I do not understand clearly the grounds upon which you make your objection. You start here, in the paragraph I have read, to invite the Court to consider the appointment of an appraiser to determine the value of the interests and the ability of the debtors to pay their secured creditors. I don't know that I can do that, and I don't think that is material, and I don't know why an appraisal is material on the question of removing

the assignee. I think it is covered by Section 2, sub-division 21 of the Bankruptcy Act. Doesn't that provide for the removal of an assignee for the benefit of creditors?

Mr. Durst: No, it merely provides for an accounting.

The Referee: Subdivision (21) of the Statute (reading:)

“Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not [5] prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, That such delivery and accounting shall not be required except in the proceedings under Section 77 and chapters X and XIII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by



such receiver, trustee or assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent, the amount of any disbursement determined by the court to have been improper or excessive.”

There is the whole statute.

Mr. Durst: The proceedings here appear to the assignee not to seek that particular relief; they are conflicting. Perhaps they are only ambiguous. The proceedings seek to maintain the action in the State Court and at the same time do the same thing in this Court. The action in the State Court went through three demurrers, and the essence of the demurrers that Mr. Cusack presented were that all the beneficiaries under the general assignment were not included as parties, and the Second Amended Complaint was knocked out on that score; and the Third Amended Complaint did present another list of the beneficiaries under the general assignment. They are not named here as respondents, and exactly the same principle involved in that circumstance is present in this Order to Show Cause. The word of action in the Section your Honor read, I believe, is the word of accounting. There is no denial of the right of this Court to require an accounting.

In the case of *Preas*, 33 Federal Supplement, 578, affirmed in *Preas vs. Kirkpatrick and Burks*,

CCA 6th, 115 Federal Second, 802, this statement was made:

“As to the removal of the trustees it is perfectly clear in my opinion, that the referee was without jurisdiction to summarily remove them.”

I cited the District Court case because it doesn't clearly appear from the Circuit Court case what the question was that was involved. The Hamburger case——

The Referee: I will get all the cases. It does appear from the language of the Section just read that the necessary prerequisite is that it might be for the appointment of a [7] trustee. You have a petition here for the appointment of a trustee now, counsel?

Mr. Siemon: Yes.

Mr. Durst: The Plan of Arrangement doesn't provide for payment of expenses of administration, and I have an authority to the effect that a proceeding that doesn't provide for that may be dismissed.

The Referee: Section 432, Chapter 12: (reading)

“The court may, upon the application of any party in interest, appoint a trustee of the property of the debtor.”

And Section 441: “A trustee, upon his appointment and qualification, shall be vested with the title of a trustee appointed under Section 44 of this Act.”

Section 411: “Where not consistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter,

have exclusive jurisdiction of the debtor and his property, wherever located.”

Mr. Siemon: If the Court will permit us to do so, and subject to the approval of the creditors here, I would like to suggest the name of William Chernabaeff as trustee. He is in his fifties, and is a successful farmer in the Shafter area in growing produce and other crops, and he owns considerable land out there, most of which is rented out; and I think he is a cousin of Mrs. Kalpakoff, and he has offered to raise sufficient funds to put this train back on the track.

The Referee: Well, we will go on with the question of the appointment of a trustee, and then go back to Mr. Durst. Does anybody want to be heard on the subject of counsel as to the appointment of a trustee?

Mr. Brown: I understood a trustee would not be appointed unless two-thirds of the creditors consent to an arrangement. I may be wrong.

The Referee: I don't think you are right, no, on that. Section 432 says:

“The court may, upon the application of any party in interest, appoint a trustee of the property of the debtor.”

Mr. Brown: It is my understanding that an arrangement must be accepted in writing, requiring two-thirds in the amount and number of creditors. Whether you can appoint a trustee before the arrangement has been accepted or not is doubtful in my opinion, because what would you appoint a trustee for if there was no arrangement?

The Referee: The property might require the attention of an officer of the Court pending the arrangement, if an arrangement is to be confirmed. I think it is analogous to the provisions in Chapter XI.

Mr. Brown: On that theory we would have no objection to it.

The Referee: No, it doesn't imply the confirmation of a plan, at all, but it is to preserve the assets pending a ruling.

Mr. Siemon: I concur in what the Court has just stated.

Mr. Brown: I think the Court should know that this Mr. Chernabaeff has been trying to buy this property for the last three years for himself, and I would like to know if he would be the proper person to be trustee.

The Referee: Ordinarily in a liquidation proceeding, naturally, that would have to be taken into consideration, because he might work up a deal advantageous to himself and exclude every other possible purchaser, but here we are dealing with debts which are secured, and if this gentleman is appointed trustee and he does finagle around and work out a deal whereby he steps into the shoes of the Kalpakoffs he is still responsible for the same secured obligations that the Kalpakoffs are.

Mr. Siemon: I think Mr. Schwabacher has something to say about it.

Mr. Schwabacher: I think it is immaterial. I go along with the Court and concur in the appointment of a Court officer, but do not waive any right

as to acceptance of the plan.

The Referee: No, there is an entirely different Section, Section 468, which provides:

“If an arrangement has not been so accepted, an application for the confirmation of an arrangement may be filed with the court within such time as the court shall have fixed in the notice of such meeting, or at or after such meeting and after, but not before it has been accepted in [10] writing by the creditors of each class, holding two-thirds in amount of the debts of such class affected by the arrangement proved and allowed before the conclusion of the meeting, or before such other time as may be fixed by the court.”

Mr. Durst: The plan provides for a trustee resident in Los Angeles County, but Mr. Chernabaeff doesn't reside in Los Angeles County, and requests to have him made receiver in the State Court were withdrawn, and I believe I should mention this only as an invitation to the Court here to concur or to consider that, and I think the Court here should consider a regular trustee, like Mr. Gardner or Miss Danning, or somebody familiar with this sort of thing.

The Referee: That is something the Court will not be inclined to do, this being a very unusual case and the gentlemen who are good enough to assume the responsibility as trustee in bankruptcy proceedings ordinarily do not have the time and are not equipped to supervise any type of farming operations, but we want somebody who has the time and experience to do a good job, and while he may

be a purchaser the plan applies only to a trustee who would function after confirmation of the plan, and that proposition might be subject to an amendment if agreed upon by the creditors. Are you a creditor?

Mr. Durst: I am the holder of the assets.

The Referee: Unless you are a creditor your observations are not in point.

Mr. Durst: I have done all I can do upon the advice of counsel up to this point.

The Referee: Going back to your objections to our jurisdiction here, this is the Preas case, 33 Federal Supplement, 578, and I will first read the syllabus and see if we can get a grasp of the case, (reading):

“In proceeding on petition for real property arrangement, where it appeared that the arrangement proposed by the debtor related only to secured creditors and that debtor was in possession of property other than that incumbered to secure the creditors affected by the proposal and requisite number of creditors had not accepted proposal dismissal of the petition was proper.”

That is one paragraph of it. Also (reading:)

“In proceeding on petition for real property arrangement, where both debtor and involved secured creditors were entirely familiar with value and property, failure of referee to appoint appraisers was not error, notwithstanding theory of debtor that appraisal would have had a coercive effect on belligerent secured creditors.”

Also (reading:)

“In proceeding on petition for real property

arrangement, referee was without jurisdiction summarily to remove trustees named in trust deeds, notwithstanding debtor's theory that if trustees were removed there would be hope of procuring an acceptance of requisite creditors to permit confirmation."

That case was appealed and went to the Court of Appeals for the Fourth Circuit, under the title "Preas vs. Kirkpatrick and Burns, CCA 6th, 115 Federal Second, 802." (Reading:)

"Where debtor, who filed petition under Bankruptcy Act alleging solvency and praying for extension of time for payment of debts, did not apply to District Court for appointment of a trustee to control debtor's property which was in hands of trustees under trust indentures, debtor could not complain that referee denied debtor's application for removal of trustees." Also (reading:)

"Where debtor who filed petition under Bankruptcy Act alleging insolvency and praying for extension of time for payments of debts, did not apply to District Court for appointment of a trustee to manage debtor's property which was in hands of trustees under trust indentures, debtor could collect rents from property if no trustee was appointed, and, referee's denial of debtor's motion to be permitted to collect rents was a substantial grievance. However, debtor's petition could be dismissed before appointment of a trustee or continuation of possession of property in debtor's hands, where no proposal by secured creditors was pending, and there was no probability that any proposal would be accepted by creditors."

Then, Mr. Durst has cited the case in 117 Federal Second, 932, in re Hamburger et al. vs. Dyer.

I find nothing in this citation relating to the removal of an assignee.

Mr. Durst: That case is cited on the point of the appointment of an appraiser. The notation I have is (reading:)

“The statute (Chapter XII of the Bankruptcy Act) neither expressly nor by implication provides for consent by the debtor to any arrangement, nor for participation in the proceedings if the real property covered by the arrangement is so far below the unsubordinated debts in value that no equity is left for the debtor.”

The Referee: That has nothing to do with the Court's jurisdiction, but might go to the question of whether the Court should further entertain the matter. The final case cited by Mr. Durst is 195 Federal Second, 263.

Mr. Durst: That is cited on the second point of my invitation, and doesn't go to the point of removal.

The Referee: The objection to the jurisdiction on the part of the Assignee for the Benefit of Creditors is overruled. Do you want to be heard on the question of your removal, Mr. Durst? I have ruled that I have jurisdiction to remove you.

Mr. Siemon: Isn't it a question to require him to turn over the property?

The Referee: Yes, and also to make an accounting. [14]

Mr. Durst: If I understand what the Court has



just said, the turning over of the property could be the turning over the possession of the property.

The Referee: No, the question is this: Shall I require you to turn over to a trustee appointed by this Court everything you now have possession of, title to or interest in in this matter?

Mr. Durst: This Court has lack of jurisdiction to do that in the absence of the inclusion of the beneficiaries of the general assignment, and I have authority on that.

The Referee: No, I don't want that. You concede that you are assignee for the benefit of creditors in this matter, do you?

Mr. Durst: Yes.

The Referee: Is there anything else you want to say?

Mr. Durst: Yes, I will present my proof.

The Referee: What proof?

Mr. Durst: My documents in the way of documentary evidence.

The Referee: You concede that you are assignee for the benefit of creditors?

Mr. Durst: Yes, and I want to show how I became that.

Mr. Siemon: The Petition for the Order to Show Cause concedes that. I don't think any proof is required where we concede that, and unless we get this property into the Bankruptcy Court and have a trustee we might as well dismiss this proceeding.

The Referee: I don't understand what you mean by proof, Mr. Durst. It is alleged that you are Assignee for the Benefit of Creditors, and you con-

cede that to be a fact.

Mr. Durst: Yes, that is true.

The Referee: What proof do you want, then?

Mr. Durst: I am here without counsel, my counsel is away, and I have had no opportunity to consult anybody about it, and I can only draw upon the information my attorney has given me, and this exact same issue of cancelling of these documents and restoring the debtors to their original possession and position is now pending in the State Court.

The Referee: That is not a bar to the jurisdiction of this Court.

Mr. Durst: No, I don't say that; but I will make a motion to dismiss the Order to Show Cause, on this point:

My motion is that the Order to Show Cause be dismissed on the ground that "An express trust in land created to pay the grantor's debts cannot be revoked without the consent of all the creditors for whose benefit it was created; nor can it be extinguished without the beneficiaries' consent, except by entire fulfillment, or by its object becoming impossible or unlawful." California Civil Code Annotations, Section 2279.

The Referee: **Motion denied.**

Mr. Durst: The respondent is ready to proceed with the trial of the issue.

The Referee: There is no trial necessary. You are the Assignee for the Benefit of Creditors, and you have property of the debtors, and in your capacity as Assignee the Bankruptcy Act confers juris-

diction on the Court in a proceeding under Chapter Twelve to require the Assignee to surrender the property and an accounting, regardless of the time the assignment was made.

Mr. Durst: I want to read the Act, Section II, I believe, 21 of the Act.

The Referee: I have read it in its entirety, and what do you find in there that would justify this Court in not requiring the Assignee for the Benefit of Creditors to turn over the assets?

Mr. Durst: I submit, your Honor, that a reading of this Section for the delivery of the possession and the accounting, that none of the rights which the Assignee has are taken away from him. I believe the Assignee stands in exactly the same position as a mortgagee in possession, and I again cite the Preas case.

The Referee: I will read to you the language: "Require assignees for the benefit of creditors to deliver the property in their possession or under their control."

Mr. Durst: I will state that the property which I have is this:

The general assignment is supported by deeds to the two ranches; the general assignment is further supported by a promissory note in the amount of \$95,000, which was the total debts of the estate at that time, secured by crop mortgages on both of the ranches.

The Referee: I am sorry, Mr. Durst. I think I understand the situation. The Petition is granted.

You may present an appropriate order, counsel,

and send Mr. Durst a copy of it, and we shall enter the order. How much time do you want for the accounting, Mr. Durst?

Mr. Durst: I am ready to file an accounting instantly, if the Court will direct me. I have copies of the annual accountings, which I have saved.

The Referee: No, I will not take those; and let's shorten this. You are directed to deliver all property in your possession forthwith, together with the necessary instruments which may be required to accomplish that delivery. You may have 10 days from the date of the order in which to file your accounting as Assignee, and a copy thereof to be transmitted on the date of the filing to counsel for Debtors. That should all be incorporated in the order, counsel.

Mr. Siemon: Yes, your Honor; and if this trustee is appointed I think the matter of the arrangement can go over for a short time to confer with the trustee as to these liens, and I think counsel here for the creditors will not object to that.

Mr. Hampton: So far as we are concerned we would be willing to have the matter go over 30 days to see if that can be worked out, to see if they can sell the property; but if they can't, we would like to have it understood that they make no application for further restraining order under the trust deeds.

The Referee: We have that proposition very often here and it just is not feasible.

Mr. Hampton: I was afraid of that.

The Referee: We don't know what might occur

30 days hence, and I prefer to leave it with a straight continuance; but, first, is the question of the trustee.

Mr. Mack: One of the questions is whether or not this ranch is going to be operated, since it is in bankruptcy, and I think it is very material.

The Referee: The Court authorizes the borrowing of sufficient money on a current crop to take care of the equipment company situation. You want to go ahead with the producing of the crops?

Mr. Siemon: Yes, your Honor.

The Referee: Will this man accept the trusteeship?

Mr. Siemon: He assured the debtors that he will, if we get Mr. Durst out.

Mr. Mack: I don't believe this is the type of man to do this. It requires a great deal more book work than ranching, and Mr. Kalpakoff is going to be operating the ranches, and it takes the handling of finances and funds and incoming money and keeping books, and Mr. Chernabaeff may be a good farmer, but I don't know that he is the type of man to be trustee in this matter.

The Referee: My reaction is that we should have somebody in that area to act as trustee. I can't send one of our regular trustees away out there to handle it; and the Court has control of it all the time and if it happens that it is not working out I have control over it. How much bond do you suggest? How much money is the trustee going to have?

Mr. Siemon: I would say a \$5,000 bond would

be sufficient to start with, and raise it later on when the crops are harvested.

The Referee: We, of course, have authority to increase a bond of a trustee, and you should inform this man that if he takes into his possession cash in excess of the amount of his bond, then, the bond must be increased according to such amount. Is there any further comment about the amount of the bond at this time? (No response.)

Now, let me try to put down on paper here the name of the trustee.

Mr. Siemon: His name is William Chernabaeff.

The Referee: Have you his address?

Mr. Siemon: Yes, Shafter, Kern County, California.

The Referee: I have to have an order, counsel, appointing him trustee, and the bond of this trustee must be a surety bond for \$5,000.

Mr. Siemon: I will draw the order; and the order to turn over the property will be an order to turn it over to the trustee?

The Referee: Yes, but he must qualify immediately and get that bond in here and file it, and file an order approving his bond, with the bond; and you should send in some copies of it so we can certify them and return them to you, showing his authority to act as trustee. You may have any number of copies you want of the order.

Mr. Siemon: I will have it multigraphed.

Mr. Hampton: I suppose it is satisfactory if we prove our claims at the time it goes over to?

The Referee: Yes, everyone may do that.

Mr. Brown: I would like to suggest a 45-day continuance, because I think there is a very great doubt if there will be sufficient money produced to accomplish the plan of the debtors, but I think we will know the answer by that time.

Mr. Siemon: Yes.

The Referee: What about Wednesday, July 28th at 10 a.m.? Is there any objection to that particular date?

Mr. Durst: Would the Court extend the time within which the Assignee could file a petition for review to and including that date?

The Referee: No, no, there is no reason for that.

Mr. Durst: It occurs to the Assignee that someone might desire to take up his rights here.

The Referee: You may file the petition for review within 10 days from the date of the order; or within that 10 days you may file a petition for an extension of time.

Mr. Hampton: Mr. Durst, has anything been done to put the taxes on a five-year plan?

Mr. Durst: A letter has been received and I hand it to you, stating they will take it up on July 1st.

Mr. Hampton: I suggest that the trustee have power to borrow sufficient money to pay the first payment of those taxes on the five-year plan.

The Referee: I think Mr. Siemon should take care of that.

Mr. Siemon: I shall do that.

The Referee: That is all today.

Los Angeles, Wednesday, July 7, 1954, 10 a.m.

The Referee: We will take up the two Kalpakoff matters.

Mr. Durst: I would like to hand up an Opposition with the Motion and Affidavit of Walter C. Durst. I would like to say that the Opposition is based on the Assignee's Reports, and I hand up the four Annual Reports, and the Supplement. Those are the originals of the Annual Reports and the Supplement, and contain all the documents and assignment and letters from and to the Debtors.

The Referee: Are there any copies available of these instruments?

Mr. Durst: They have been served.

Mr. Siemon: Yes, we have copies of those.

Mr. Durst: Do you desire a copy, Mr. Allen?

Mr. Allen: No. I am not attorney of record for the Greenmans, although Mr. Greenman is a client of mine, but I am not appearing of record here for him.

Mr. Durst: I would like to ask that those documents be marked as exhibits.

The Referee: The Court has not engaged in any hearing yet, and it is not proper to mark anything as an exhibit at this time.

Mr. Durst: Thank you, your Honor, and I apologize.

The Referee: Now, let's get this situation clear, Mr. Durst; as you know, the Court has entered an order directing you to do certain things, and there is a showing that you failed to do those things. The Court is now asked to certify the matter to the



United States District Judge for contempt proceedings. Now, you have an instrument here you call an Opposition and a Motion. First of all, the Court, at a hearing such as we are now having, does not go behind the order made requiring you to do certain things. The only thing you can show here is that you did not and are not wilfully disobeying the order. That would be a factor the Court would take into consideration in determining whether or not it should be certified at all, and if so, the manner in which it should be certified. Now, of course, you, at any time, can move the Court to vacate the order now sought to be imposed by contempt proceedings and reopen the hearing. I am not clear as to what you are doing here. Are you showing grounds why the Court should not certify you as being in contempt, or are you moving the Court to vacate the order showing you to be in contempt, and reopening the hearing in the matter, or what are you proposing to do?

Mr. Durst: Well, I was puzzled by the order of June 15th. I am representing myself and I may have a fool for a client. I was fooled by the order of June 15th which recited that the matter in the petitions of the debtors were not controverted.

The Referee: Now, let us not have any extensive discussion here; the order is made, and whether you did or did not understand it is of no materiality here now, and there are only two things that can be done by you here this morning; either show good cause why you should not be certified for fail-

ure to comply with the order, or make a motion to forget the order and reopen the proceedings.

Mr. Durst: I consider that I have made such motion.

The Referee: Let us try to understand this situation. A hearing was had and an order made, and the order was served upon you and you filed a petition for review of that order.

Mr. Durst: Yes, within the time allowed.

The Referee: And you also filed another petition here, I don't know whether counsel was advised of it or not.

Mr. Durst: Yes, he was served with it, and that was the stay.

The Referee: You filed a petition for order staying the execution of the order of June 15th, 1954, and that petition was denied by this Court June 23, 1954.

Mr. Durst: And a review was taken on both orders.

The Referee: While you claim you are without counsel, you are an attorney and as such you are familiar with the provisions of Section 39c of the Bankruptcy Act, which provides, among other things:

“The court, upon the filing of a petition for review, may suspend the execution or enforcement of the order complained of upon such terms and conditions as the court may deem advisable and as will protect the rights of all parties in interest.”

You have applied to the Court for a stay, and that is denied. Therefore, the Court's order from

which you have filed a petition for review is in full force and effect.

Mr. Durst: No, not as I read the cases, citing 98 Federal, 839; 193 Federal, 622.

The Referee: You say that you are making a motion to vacate the order made by the Court, and which is here sought to be considered; you have already filed your petition for review?

Mr. Durst: Yes; and I will state there having been no certificate, I believe that for the purpose of the motion to vacate the reviewing party would be entitled to do one of two things, either withdraw the petition for review upon being granted an extension of time within which to review, or to take the position that for the purpose of the motion the petition for review might be deemed to be withdrawn.

The Referee: I will consider your motion. The grounds upon which your motion is made are the following:

(Whereupon, the Referee read said motion in its entirety.)

Mr. Durst: Thank you.

The Referee: All of that is immaterial, and the motion is denied. Have you any cause to show why you should not be certified for contempt?

Mr. Durst: Yes; I offer the assets, first; and the four reports and the supplements to them, as exhibits.

Mr. Siemon: We object to those as exhibits. They only have a bearing on his relationship to the assets which are his only as Assignee for the Bene-

fit of Creditors, and they are offered only to smother us with paper work.

The Referee: The objection is sustained and the instruments are rejected. Do you offer these as reports of your acts and conduct as Assignee for the Benefit of Creditors?

Mr. Durst: Yes.

The Referee: If you want to file them at this time in that sense the Court will call the Clerk and have them filed, but they are definitely not to be any of the record of proceedings before the Court at this time.

Mr. Durst: Yes, but I have made the offer of proof and that is a part of it, and I ask that these documents be sent to the District Court Judge as my exhibits.

The Referee: I will not do that. I sustain the objection to the offering of these instruments in evidence, and they are rejected and are not in evidence. However, after we have concluded here if you want to have these instruments filed as your reports and accounts I will have the Clerk file them. Have you anything else to show why you should not be certified for contempt?

Mr. Durst: I desire to clarify one thing, and that is to have these documents marked for identification, because I am going to take it to the Judge of the District Court and ask that Court to order them up on this matter, and I don't want to get into any lack of protecting myself. I believe your Honor is trying to help me, I have no doubt of that, and I am satisfied your Honor is trying to do

the best he can for me, but I am not used to anything like this, and I am trying to act for myself, and I ask that these documents be marked for identification in this proceeding, under the rules of documentary evidence.

The Referee: Do these documents show you complied with the order here?

Mr. Durst: They show I have no right to comply with the order, and that I am powerless to do so. There is also an authority in the United States Codes Annotated, to the effect that contempt cannot be had where there is no authority and no power to make reconveyance. The General Assignment gives me power to act only as Assignee, and at no time do I ever intend in my life to execute a release in this case only on fulfillment of the General Assignment.

If the Court desires to appoint a Commissioner to function for me, all right; but I have no power to execute a reconveyance and release; and I desire to have these documents marked for identification for consideration by the Judge of the District Court—(pause)—I had them in my hand and I sought to introduce them at the last hearing and this Court wouldn't receive them, and I now move that it be reopened as of June 9th so they may be part of the record in this matter.

The Referee: Your motion is denied, and I want this record to show that these instruments you desire me to mark for identification consist of five separate bound volumes which, I think, make a pile of documents at least six inches high. If I am

not correct, correct me. I do not propose to encumber this record with these documents, or to impose upon the District Judge in that manner. I shall read into this record a description of these instruments, and if the Judge who hears the case rules I was in error in not marking them for identification, I am sure they can be readily produced before the Judge. The instruments in question are:

“In the Matter of General Assignment of Jack P. Kalpakoff and Mary Kalpakoff, Debtors, Assignors:

“First Report and Account of Assignee for the Benefit of Creditors, from November 25, 1949 to December 31, 1950.”

“Second Report and Account of Assignee for the Benefit of Creditors, from November 25, 1949 to November 25, 1951.”

“Third Annual Report and Account of Assignee for the Benefit of Creditors, for the period from November 25, 1951 to December 17, 1952.”

“Fourth Annual Report and Account of Assignee for the Benefit of Creditors, for the period from November 25, 1952 to December 17, 1953.”

“Supplement to Assignee’s First Report, Second Report, Third Report, and Fourth Report.”

Documents signed by the Kalpakoffs, letters mailed and received to and from Kalpakoffs.

(Immediately following five-minute recess the hearing was resumed, as follows:)

Mr. Durst: I wish to offer in evidence in my defense the Proposed Real Property Arrangement, particularly in reference to paragraph IV, as follows (reading):

“Trustee to take over and be substituted for petitioner as plaintiff in the action against Walter C. Durst referred to in Amended Schedule A-2(7) and Amended Schedule B-3, and prosecute the same on behalf of the estate for cancellation of the assignment for the benefit of creditors and for damages for fraud, neglect, non-performance of duties and mismanagement of the assignee for the benefit of creditors, and to such end to file such amendments to the pleadings and initiate and prosecute such proceedings in said action as may appear to be required.”

The Referee: You are offering in evidence the Original Petition under Chapter 12 in these cases?

Mr. Durst: No.

The Referee: Is not that what you are reading from?

Mr. Durst: No; I am reading from the “Proposed Real Property Arrangement” by the Debtors.

The Referee: Is that the pending Plan of Arrangement?

Mr. Siemon: Yes, the pending proposed arrangement, and that is what we have filed.

Mr. Durst: I would like to be sworn.

The Referee: For what?

Mr. Durst: To give testimony on how and why these were filed.

The Referee: No, I am sorry; you are still subject to the direction of this Court.

Mr. Durst: Yes.

The Referee: I have given you every opportunity to show some cause why you should not be certified for contempt, and I think you have had

ample time to do it, and you have suggested a number of irrelevant and immaterial matters, and I don't think you have any good cause to show why you should not be certified for contempt, because the matter is so simple that it will not take any time at all——

Mr. Durst: How simple is it?

The Referee: No, listen to me.

Mr. Durst: I want the Court to state how simple it is.

The Referee: Yes, I want to be verified by the exact language of the statute and then I will tell you why it is simple.

Mr. Durst: I will lend the Court the book.

The Referee: I will get my own book. It is conceded, of course, that the matters now pending before the Court here were filed and will be administered under the provisions of Chapter XII of the Bankruptcy Act. Under Section Two of the Bankruptcy Act, Paragraph A, Sub-Division (21) the Bankruptcy Court has jurisdiction to:

“Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or a trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provi-



sions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and accounting shall not be required, except in proceedings under Section 77, Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy.”

Now, my attention has not been called by anybody to any provision of Chapter XII itself—

Mr. Durst: 475.

The Referee: Which says this Court does not have jurisdiction to require an assignee for the benefit of creditors to turn over, notwithstanding the fact that the assignment was made more than four months before the filing of the petition.

Mr. Durst: I request that you read aloud Section 475.

The Referee: All right; Section 475: (reading)

“The court may direct the debtor, his trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement.”

The Section I have just read is not applicable to the question at hand.

Mr. Durst: I submit it is a—

The Referee: I am sorry, Mr. Durst, I don't want any argument as to that.

Mr. Durst: I ask for a continuance.

The Referee: Article III of Chapter XII sets up the "Jurisdiction, Powers, and Duties of the Court." Section 411 of that Article provides that:

"Where not consistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

I find nothing in Article III specifically referring to the power of the Court to require Assignees to turn over.

Now, Mr. Durst, this Court has been functioning here, this Referee, for 18 years and I do not recall another instance where the Court found it necessary to certify anybody for contempt proceedings, and it is with the deepest regret that this Court experiences that situation in this case, because this Court is convinced that you seem to be laboring under a false impression here. You repeat and say over and over again that because of the assignment given you, you have no power to do anything with the property involved in the assignment except that given you in the assignment itself, and you don't seem to realize and understand the provisions of the Bankruptcy Act in a proper case terminate that power given you as Assignee for the Benefit of Creditors, and requires him to do something else, namely, to deliver up possession to the person des-

igned by the Bankruptcy Court. The order of the Bankruptcy Court supersedes and nullifies all the provisions of the assignment with reference to what the Assignee should do with the property. It is so simple that it doesn't even permit of argument. The Bankruptcy Act vests the Bankruptcy Court with authority to require an Assignee to do certain things; and after a hearing and an admission on your part that you had the status of Assignee for the Benefit of Creditors under a General Assignment, an order was made directing you to turn the property over to a designated trustee, and you have failed to do so, and there is nothing remaining for this Court to do except certify you for contempt.

Mr. Durst: In that connection I move for a continuance of two weeks.

The Referee: The motion is denied.

Mr. Durst: Also, in that connection, to be permitted to offer here in this matter the Answer of the Assignee in the State Court action, which suit has been referred to in this proposed real property arrangement, that being Superior Court action transferred to Los Angeles, entitled:

"In the Superior Court of the State of California, in and for the County of Los Angeles, No. Transferred to Los Angeles, S.F.C. 914. Answer of Walter C. Durst."

The Referee: Your offer is denied, on the ground that it is entirely immaterial.

Mr. Siemon: I can't see why Mr. Durst doesn't turn this property over so we can administer it.

His attitude is bound to be disastrous and it keeps us from administering this property, and I don't see why he is so obstinate in obeying the order of the Court here.

The Referee: How do you propose to show this up, Mr. Siemon?

Mr. Siemon: The procedure seems to be that you issue an order to show cause on it.

The Referee: Have you prepared that?

Mr. Siemon: Yes, and we can give him some time and take it up on the 15th or any time thereafter. I don't believe there is anything in any of the rules to give counsel a chance to cavil about that.

Mr. Durst: Rule 7 of the District Court of the United States, Southern District of California, provides that all documents should be produced on both sides in a matter such as this, and particularly to the opposing counsel for approval.

The Referee: Rule 7 says: (reading)

“All findings, conclusions of law, judgments and decrees and all orders affecting title to or creating a lien upon real or personal property, all appealable orders, and such other orders as the court may direct shall be prepared in writing by the attorney or attorneys for the successful party, unless the judge shall order otherwise; and the same shall embody the court's decision.

“In the case of orders, judgments or decrees, in the space to the right of the title of the cause and under the number of the cause, counsel shall show the substance of the order, decree or judgment as

he desires it entered in the docket by the clerk as required by the FRCP, Rule 79(a) thereof.

“No document governed by this rule shall be signed by the judge unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to file with the judge, within five days from the time of the receipt of a copy thereof, as such time is shown on the original or by affidavit of service, a written detailed statement of the objections thereto and the reasons therefor.

“Counsel, whose duty it is to prepare any such document, shall submit a copy thereof to opposing counsel who shall promptly (1) endorse on the original an approval, or (2) endorse a disapproval as to form, or (3) acknowledge thereon the date and hour of the receipt of the copy thereof. If objections are filed within the time limit herein, the judge may thereafter require the attorneys interested to appear before him or he may sign the document as prepared or as modified by him.”

Now, do you desire to file at this time these reports, or take them with you?

Mr. Durst: I want them marked for identification.

The Referee: No, I will not do that. Do you want to file them here as your reports?

Mr. Durst: Yes.

The Referee: All right. That is all at this time.

[Endorsed]: Filed November 8, 1954.

[Title of District Court and Cause 60963-4.]

NOTICE OF MOTION TO EXPUNGE PURPORTED REPORTER'S TRANSCRIPTS of Hearings Before Referee July 7, and June 9, 1954, and Order Separate Verbatim Transcripts To Siemon and Siemon, attorneys for the debtors, and the trustee, 259 Haberfelde Building, Bakersfield, California.

Please take notice that the undersigned will bring the hereinafter set forth motion on for hearing before this Court, in the courtroom of the Honorable Ernest A. Tolin, Second Floor, Federal Building, 312 North Spring Street, Los Angeles 12, California, on Monday the 15th day of November, 1954, at 10:00 o'clock a.m. in the forenoon of that day or as soon thereafter as counsel can be heard.

Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, moves the court as follows:

(a) To expunge the purported reporter's transcript of the evidence taken before the referee in bankruptcy herein, on July 7, 1954, and June 9, 1954, during which said hearing of July 7, 1954, the respondent made application that the reporter prepare a transcript of said hearing which application was granted by the referee as to said hearing and the previous hearing of June 9, 1954; and

Said motion will be made on the following grounds: (1) that from said purported reporter's transcript are omitted important admissible parts

of the proceedings on said dates before the referee; (2) said purported reporter's transcript combines the two proceedings under one cover and omits to state the proceedings had on July 7, 1954, and the appearances at said hearings, in addition to the above mentioned omitted portions of said hearings; (3) said purported reporter's transcript does not comply with the provisions of Title 28 U.S.C.A. Section 753, in that same omits portions of the record verbatim by shorthand of admissible evidence actually taken at said hearings in open court in the presence of the referee and while said hearings were in progress and prior to the adjournment thereof; (4) said purported reporter's transcript does not comply with Bankruptcy Act, Section 39, in that same does not preserve the evidence taken; and (5) said purported reporter's transcript does not comply with the provisions of General Order 22.

Said motion will be based upon the records and files in the referee's office, the records and files in the Clerk's office, the affidavit of Walter C. Durst appearing specially and such other and further evidence as may be presented to the Court at the said hearing.

/s/ WALTER C. DURST,

Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff appearing specially.

/s/ MORRIS LAVINE,

Attorney for the Assignee  
appearing specially.

It is ordered that the time of service be, and the same hereby is, shortened.

/s/ HARRY C. WESTOVER,  
United States District Judge

AFFIDAVIT OF WALTER C. DURST  
APPEARING SPECIALLY

State of California,  
County of Los Angeles—ss.

Walter C. Durst being first duly sworn, deposes and says: That he is Walter C. Durst, Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Appearing Specially;

That on or about October 18, 1954, at the invitation of E. B. Bowman, reporter, affiant went to Mr. Bowman's room in the Federal Building, was handed an unbound copy of a purported transcript by Mr. Bowman.

Affiant has not seen the purported transcript since said October 18, 1954, and makes this affidavit from affiant's memory of the hearings of June 9, 1954, and July 7, 1954, by comparing affiant's memory of said hearings with affiant's memory of the contents of the purported transcript.

That should any inaccuracy appear in this affidavit the same is inadvertent and upon any inaccuracy being discovered affiant asks leave to amend this affidavit to correct same. The purported transcript appears to have been prepared for the binding under one cover although two separate hearings



were had of two different proceedings on two different hearing dates, and there were different appearances on each date. The frontispiece appears to be for the hearing on June 9, 1954, and appears to recite the title of the cases, portions of the nature of the proceedings set for hearing on said day and the appearances at said hearing. The next page following the last page of the hearing of June 9, 1954, appears to be followed by the purported proceedings and colluquy of the hearing of July 7, 1954. No separate certificate appears for the purported transcript of the hearing of June 9, 1954. There is no frontispiece for the hearing of July 7, 1954 setting forth the title of the cases, the nature of the matters on the referee's calendar at said hearing, the appearances of parties and counsel at said hearing and a statement of the persons who addressed the court at the said hearing of July 7, 1954. There appears to be no separate certificate as to the said hearing of July 7, 1954. The purported transcript fails to set out the proceedings had, the discussion and argument verbatim, or correctly, or at all, respecting the application made by affiant for a reporter's transcript during the hearing on July 7, 1954, and the referee's granting of said application both as to the transcript for that day and the transcript for June 9, 1954.

The said purported transcript fails to set out the proceedings had, the discussion and argument verbatim, or correctly, in full, on the 9th day of June, 1954, in open court while court was in session and prior to adjournment.

Prior to the ruling by the court on the Order to Show Cause affiant asked for a copy of the Bankruptcy Act from which to read Section 2 a (21), whereupon a colloquy with the court ensued, which colloquy does not appear to be included verbatim, or correctly or at all in the purported transcript.

Prior to the ruling by the court on the order to Show Cause affiant spoke to the power of the Court under section 2 a (21), and the purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all.

Affiant made application to the court that a copy of the order which the court announced would be made be served upon affiant in advance of the signing thereof, and the purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting said matter.

The purported transcript causes it to appear that the hearing of the order to show cause was interrupted for the appointment of a trustee. This is not the way affiant recalls the proceeding. As affiant recalls the matter the appointment of a trustee was taken up after the hearing on the order to show cause was concluded and the appointment of the trustee selected by the debtors was opposed by P. M. Schwabacher at some length. The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, respecting same.

That the said purported transcript fails to set

out the proceedings had, the discussion and arguments, verbatim, or correctly, in full on the 7th day of July, 1954, in open court and while the court was in session, and prior to adjournment.

Affiant is informed and believes and therefore avers that a word typed in separately after line 13 on page 23, appears to be an addition to the answer made and the meaning of the answer appears to be changed.

The application respecting the stay of the proceedings was incorrectly reported. As it appears in the purported transcript it seems to appear that the application for the stay was made after the petition for review, but no application for stay was made prior to said hearing after the filing the petition for review.

Respecting the proceedings for a stay made during the hearing the purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all.

There was an offer of proof made in the referee's court with reference to a letter. In said letter written by Mr. Siemon to Mr. Kalpakoff during December 1953, in duplicate, Mr. Siemon informed Mr. Kalpakoff that he could send a copy of said letter to Mr. Lysle Greenman, the trust deed holder of the Rosamond Ranch, and expressed the opinion that if the Kalpakoffs' two ranches went to foreclosure it might be possible to buy them in cheaply, and avoid the general assignment, or words to that or similar effect. Mr. Greenman stated to affiant

that he had shown the letter to Sam Houston Allen his attorney. None of which was controverted by Mr. Siemon at the said hearing on July 7, 1954 and was introduced to show want of equity in the debtors who had brought about the present conditions by refusing to sell a ranch or ranches. Mr. Sam Houston Allen the said attorney was present in the courtroom on July 7, 1954, with reference to said matter and his appearance and discussion with the court are unreported. The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting same.

The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting charges by Mr. Siemon that affiant had filed these proceedings, affiant's reply that the debtors filed the proceedings with the assistance of Mr. Siemon, and the court's comment that he did not take that matter into consideration in his ruling, or words to that or similar effect.

The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting the request of respondent for leave to employ counsel.

The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all regarding the debtors proposed plan and affiant's response thereto.

Affiant pointed out in the proceedings on July 7,

1954, that the referee was shouting at affiant, which the purported transcript fails to disclose.

/s/ WALTER C. DURST,  
Affiant.

Subscribed and sworn to before me this 12th day of November, 1954.

[Seal] /s/ VERONA TAFT,  
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 12, 1954.

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[Title of District Court and Cause 60963-4.]

### MOTION TO DISMISS CITATION FOR CONTEMPT

Comes now Walter Durst and moves this Honorable Court to dismiss the citation for contempt upon the following grounds, to-wit:

1. The Referee was without jurisdiction to cite the petitioner for contempt since the petitioner had given notice of a petition for review of the order of the Referee.

2. Mr. Durst appeared only specially in the bankruptcy court, and the court did not have jurisdiction, therefore, to proceed against him for the reasons stated in our opening memorandum and in our closing memorandum.

3. The Trustee and his attorney failed to bring

up a full and complete or proper record of the proceedings and failed and has failed to have an accurate record for consideration by this Court.

4. The Referee lacked jurisdiction, in any event, to order a turn-over of property unless and until a plan of arrangement was confirmed as provided by Section 475 of the Bankruptcy Act.

This motion is made upon all the records and files and papers and proceedings had in the above entitled cause and this motion.

Respectfully submitted,

/s/ MORRIS LAVINE,

Attorney for the Assignee for the Benefit of Creditors, Appearing Specially.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 15, 1954.

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In the United States District Court, Southern District of California, Central Division

No. 60963-T and No. 60964-T.

In the Matter of JACK P. KALPAKOFF and MARY KALPAKOFF, Debtors.

**ORDER OF DISTRICT JUDGE ON PETITION FOR REVIEW OF REFEREE'S ORDER**

At Los Angeles in said District on the 29th day of November, 1954.

Upon the petition for review of the assignee for

the benefit of creditors appearing specially from the referee's order of June 15, 1954, and upon all proceedings had before the referee, and upon the files, proceedings and exhibits herein, and upon hearing counsel for the parties, it is

Ordered that the order of the referee entered June 15th, 1954, being Order Requiring and Directing Assignee for the Benefit of Creditors to Deliver Property in his Possession, be affirmed.

/s/ ERNEST A. TOLIN,  
United States District Judge

[Endorsed]: Filed November 29, 1954.

[Endorsed]: Judgment docketed and entered November 30, 1954.

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[Title of District Court and Causes 60963-4.]

ORDER VACATING APPOINTMENT OF  
COUNSEL FOR ASSIGNEE

An Order having been heretofore made herein appointing Morris Lavine as counsel in the above entitled matter for Walter C. Durst as common-law assignee for benefit of creditors, which Order was made ex parte without notice to debtors or the Trustee; and it appearing that said Order was inadvertent and without authority;

Now, Therefore, in consideration of the premises, said Order appointing Morris Lavine as counsel for

Walter C. Durst as such assignee is hereby set aside, vacated and annulled as of this date.

Dated: December 6, 1954.

/s/ ERNEST A. TOLIN,  
Judge of the United States District Court for the  
Southern District of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 6, 1954.

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[Title of District Court and Causes 60963-4.]

### ORDER ON MOTIONS AND APPLICATION OF ASSIGNEE

The several matters hereinafter mentioned having been heretofore presented, argued and heard by the Court, to wit: (1) motion of Walter C. Durst, common-law assignee for the benefit of creditors for an order setting aside the general reference in the above matters; (2) the motion of said Durst, as such common-law assignee for an order consolidating the above entitled matters; (3) the motion of said Durst, as such common-law assignee for an order allowing and approving the filing of one claim on behalf of all creditors; and (4) the objection and opposition of said Durst, as such common-law assignee, to the proposed arrangement and a proposed new arrangement; (5) motion of said Durst, as such assignee for a restraining order



preventing the trustee and debtor from interfering with his management of the estate; said Durst appearing specially and by his attorney Morris Lavine and the debtors and trustee appearing by Alfred Siemon, of the law firm of Siemon & Siemon; and all of such matters having been submitted to and duly considered by the Court, and the Court having announced its decision on such matters in open Court on November 22, 1954,

Now, Therefore, It Is Hereby Ordered that said motion for an order setting aside the general reference in the above entitled matter is hereby denied, and the Referee is instructed to proceed with all of his lawful duties in connection with the administration of said estate; said motion for an order consolidating the two above entitled estates is denied without prejudice to such motion being renewed before the Referee; the motion of the common-law assignee for an order approving the filing of one claim by him on behalf of all of the creditors is denied without prejudice to such motion being renewed before the Referee; the opposition to the debtors' proposed arrangement and the application of the assignee to be allowed to propose a new arrangement is denied without prejudice to the filing of such opposition and proposed new arrangement with the Referee if they have not previously been so filed and if, at the time of such filing with this Court, their filing with the Referee would have been timely and proper; and the motion of the assignee for a restraining order to prevent interference with

his management of the common-law assignment is hereby denied.

Dated: December 6, 1954.

/s/ ERNEST A. TOLIN,  
Judge of the United States District Court for the  
Southern District of California

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 6, 1954.

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[Title of District Court and Causes 60963-4.]

### ORDER DISMISSING CONTEMPT PROCEEDINGS

The matter of the order by Referee Benno M. Brink to Walter C. Durst to appear and show cause before the Hon. Ernest A. Tolin, Judge of the above entitled Court, why said Durst should not be punished for contempt for failure and refusal to comply with the Referee's Order of June 15, 1954, requiring him to turn over property held by him as assignee for the benefit of the creditors of the above named debtors, came on duly and regularly on adjourned hearing at 10 o'clock a.m. on November 29, 1954, before me at my Courtroom in the Post Office Building, in Los Angeles, California; Alfred Siemon, of Siemon and Siemon, appeared for the Trustee; and said Durst appeared specially in his own behalf and stated in open Court that he intended to and would comply with said Order; and said Durst having tendered in open Court a "Deed,

Satisfaction, Releases by Court Order” in compliance with the said Order of the Referee of June 15, 1954, the matter was set over to 3:30 o’clock p.m. on said day, and at the last mentioned hour Morris Lavine appeared specially for said Durst and said document was approved in open Court by counsel for the Trustee after certain corrections thereon had been made by said Durst and after same had been re-acknowledged by him in open Court;

Now, Therefore, It Is Ordered that said “Deed, Satisfaction, Releases by Court Order” so tendered and approved as aforesaid be and the same is hereby accepted as full compliance with the Order of Referee Benno M. Brink dated June 15, 1954, requiring said Walter C. Durst, as assignee for the benefit of the creditors of said debtors, to convey and deliver to William Chernabaeff, Trustee herein, the property described in said Order; and said Durst having thus purged himself of contempt in the disobedience of said Order, this contempt proceeding is hereby dismissed and said Durst is hereby fully exonerated.

Dated: December 7, 1954.

/s/ ERNEST A. TOLIN,

Judge of the United States District Court for the Southern District of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1954.

[Endorsed]: Judgment docketed and entered December 9, 1954.

[Title of District Court and Causes 60963-4.]

### NOTICE OF APPEAL

Notice is hereby given that Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from all final orders and judgments of the United States District Court in the above entitled matter made and entered herein, including orders made on November 22, 1954, also on November 29, 1954, also on December 6, 1954, and also December 7, 1954, and particularly from the Judgment and order of the United States District Judge affirming the referee on Petition for Review of Referee's Order, made November 29, 1954, and entered November 30, 1954, and from all the final Orders on Motions and Application of Assignee of December 6, 1954, also from the final Order Vacating Appointment of Counsel for Assignee of December 6, 1954, also from the order and Judgment Dismissing Contempt Proceedings upon enforced compliance by the assignee under protest with the referee's order from which the aforesaid review was taken, made December 7, 1954, and entered December 9, 1954, and all proceedings had therein prior

to the judgment of dismissal of the contempt proceedings.

/s/ MORRIS LAVINE,

Attorney for the Appellant Walter C. Durst, assignee for the benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially.

[Printer's Note: Notice of Appeal in 60964 is the same as in 60963 above.]

[Endorsed]: Filed December 20, 1954.

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[Title of District Court and Causes 60963-4.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 293, inclusive, contain full, true and correct copies of the documents listed in the index included herewith, which documents, together with the original Assignee's Exhibits A to O, inclusive, and the Reporter's Transcript of Proceedings held on June 9, July 7, November 8, 15, 22, and 29, 1954, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 9th day of February, 1955.

[Seal]                   EDMUND L. SMITH,  
                                  Clerk  
/s/ By THEODORE HOCKE,  
                                  Chief Deputy

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[Title of District Court and Causes 60963-4.]

### CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 44, inclusive, contain the original

Special Appearance and Request for Notice of Entry of Orders, etc., filed June 11, 1954;

Petition of Trustee for Authority to Sell Real Property, filed December 23, 1954;

Order Directing Sale of Real Estate Free from Liens, filed January 12, 1955;

Petition for Review of Referee's Orders of January 12, 1955, and December 10, 1954, filed January 21, 1955, with the order of your referee dated January 21, 1955 endorsed thereon;

Referee's Certificate on Petition for Review of Orders Directing Sale of Real Estate Free from Liens;

Reporter's transcript of hearing of April 4, 1955;



for Order to Show Cause to William Chernabaeff, Trustee, etc.;

Objections to Petitions of Jack P. Kalpakoff and Mary Kalpakoff for Real Property Arrangements;

Praecipe—Additional Designation of Record on Appeal (60963-T);

Praecipe—Additional Designation of Record on Appeal (60964-T)

Which, together with a full, true and correct copy of Section 422 Opening Proceeding Real Property No. 60963-T and No. 60964-T, Referee's Dockets in Case No. 60963-T and No. 60964-T, District Court Dockets No. 60963-T and No. 60964-A; and one volume of Reporter's Transcript of Proceedings had on Monday, September 13, 1954; all in said cause, constitute the supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 14th day of June, 1955.

[Seal]

JOHN A. CHILDRESS,  
Clerk

/s/ By CHARLES E. JONES,  
Deputy Clerk



In the United States District Court, Southern District of California, Central Division

No. 60963-T—No. 60964-T

In the Matter of JACK P. KALPAKOFF and MARY KALPAKOFF, Debtors.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Nov. 8, 1954

Honorable Ernest A. Tolin, Judge presiding.

Appearances: For the Assignee for the Benefit of Creditors: Morris Lavine and Walter C. Durst. For Debtors: Alfred Siemon. [1\*]

The Clerk: No. 60,963, in the matter of Jack P. Kalpakoff, and 60,964, in the matter of Mary Kalpakoff.

Hearing on order to show cause restraining respondents from interfering with sale by assignee for benefit of creditors, of real property to fulfill purposes of general assignment by payment of creditors, et cetera.

Mr. Lavine: I am appearing on behalf of the petitioner and the general assignment.

May I ask the court at this time for leave, also, to have Mr. Durst, who is an attorney, to appear as one of the attorneys for the general assignment, in addition to myself.

The Court: All right. You mean he wants to argue, too?

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Lavine: What is that?

The Court: You mean he also wishes to make an argument?

Mr. Lavine: No. We may have some matters presented to the court I might forget or I might be tied up in some other court, and I didn't want the court to be delayed on any of these proceedings, due to absence. Under those circumstances, I want to be in the clear.

The Court: All right. The clerk will note the presence of Mr. Durst. And other counsel please note it.

If Mr. Lavine is unavailable at any time, Mr. Durst, I take it, will be available to fill in the breach. [2]

Mr. Lavine: That is correct, your Honor.

At this time, if your Honor pleases, these documents were served on opposing counsel in connection with this matter, but do not appear to have been filed. They are memorandums in support of the petition which has been filed with your Honor.

The Court: You want to file them?

Mr. Lavine: Yes. And also we would like, in support of our petition,—

Sit down, Mr. Siemon. You make me nervous.

Mr. Siemon: I am here in response to an order to show cause.

Mr. Lavine: I appreciate that. As soon as I am through, I will sit down and you will have your chance.

Mr. Siemon: If I am cited to answer an order to show cause—

Mr. Lavine: We are the petitioners, your Honor. I think we have the first duty to see that all our documents are in, and then he may respond.

The Court: Yes. The documents really should have been in before the petition for order to show cause was filed.

Mr. Lavine: They are in, your Honor, except they are in the previous proceedings and I want to make them a part of these proceedings, if that becomes necessary.

The Court: Actually I couldn't see, on my reading of [3] papers that are heretofore filed, this hearing today encompasses any new basic issues.

Mr. Lavine: If your Honor pleases, heretofore there have been offers of purchases of these properties.

Mr. Durst has been contacted by various people. We have a letter dated here October 14, 1954, by a realtor. We have had numerous calls to Mr. Durst for the possible purchase of this property. If he could proceed to make a sale uninterfered with, perhaps the whole matter might be terminated.

In order to do that, he felt that it was necessary to present these interferences, because the documents which have been heretofore offered in the previous proceedings, and which we now offer, renew our offer as to the six exhibits which were offered at the previous proceedings, A to F, in support of these proceedings, and also the amended schedules which have heretofore been filed we offer in these proceedings, and the original restraining order.

We only have here an additional written docu-

ment of Ralph C. Boyd, a realtor, dated October 14th, which we wish to offer in connection with the proposed purchase of these properties.

And a document that was offered before Referee Brink and submitted to him, and copy of which has been previously served upon counsel. [4]

A copy of the document that was filed before Referee Brink on April 29, 1954, and it is complete except the verification which was on it originally has not been copied here.

These are the documents we offer at this time in support of our petition, your Honor.

Your Honor has the other affidavits and supporting papers, showing there have been negotiations.

All Mr. Durst wishes to do is be uninterfered with in the matter of the proposed sale. And we want, of course, the record to be clear he is appearing specially and in this matter.

The Court: He is asking for a lot of relief for a man who is appearing specially.

Mr. Lavine: He is not asking for any relief, your Honor. It is the Cestui Que Trust that is asking for relief. He is asking not to be interfered with. That is our position, your Honor.

Mr. Siemon: Your Honor, please, your remark to the effect this petition offered nothing new is precisely and absolutely correct.

This petition on which this order to show cause was granted fails to state any fact whatever. And it certainly fails to state any fact that would authorize the court to interrupt the proceedings, which are basically before this court, and that is the

matter as to whether or not Durst [5] should be compelled to turn this property over, in accordance with the order of the Referee.

I had prepared, and I served on Mr. Durst's counsel this morning in court, the combination of an answer and demurrer. The substance of the matter is that, obviously, Mr. Durst can't make a sale and has no authority whatever to make a sale, unless the bankruptcy proceeding is dismissed or unless the order of the receiver, of the Referee to set aside this property is dismissed.

Now, let me say here we don't want anything whatever to do with Mr. Durst. He has been in this thing four years,—

Mr. Lavine: Five.

Mr. Siemon: He has been in this thing five years, and it went to pot, to use the language of the street.

He was faced with foreclosures on both mortgages, both trust deeds on the ranch. In the meantime we had commenced a civil suit in the state court, to terminate his trust, on the ground of fraud and mismanagement and incompetency.

Yet when these foreclosure proceedings were imminent, when the property had been advertised for sale and was about to be sold, he runs into this court and has these people file a petition under his guidance, so that he can save himself from loss of this property by the Chapter XII proceeding.

Immediately he gets that relief, he begins to welch on [6] the proceedings that he starts, and he only wants the relief that he got in the way of

saving himself from the loss of the property through this proceeding. And then he comes back and said, "Well, the court hasn't any jurisdiction."

He has the temerity to file a brief, the brief before your Honor, and a lot of papers. We were here on the 26th of July on this order to show cause, as to why he shouldn't be punished for contempt. He filed a brief and he smothered us, so to speak, with over a hundred pages of typewritten matter.

I filed my brief in 10 days. The contempt proceeding was to be submitted on a brief. He was to have—I don't know how many—10 days, but I am informed that he came in and got an order he would have 15 days after the transcript of the proceedings before the Referee was made. I think I got a copy of that.

Two weeks ago I was in the—I am stating this as an officer of the court, I am attorney for the trustee here—two weeks ago I was in this building and I asked the reporter in Judge Brink's department about whether that transcript had been made, and he said yes, it had been made and Mr. Durst was in to look at it but there was some complaint about it, there was something in it that was either error or something had been omitted from it, and he wanted his counsel to see it. And this reporter told he had called the [7] counsel a couple of times and the counsel hadn't come in.

But the brief has not been in yet. The brief is not here. Yet we had this matter up on the 26th of July.

Now, they come in with a lot of papers and, of

course, the trustee's counsel isn't remunerated until there is some money in the estate, and they swamp us, so to speak, with a lot of papers served on us this morning, and filed, which are repetitious and which are conclusions. They don't state any facts. They present this matter this way: He wants to act as sort of a partner with the court in the administration of this matter. He wants to go out and sell the property. He has to be told by a Referee upon good authority, under the law, to turn the property over, but he still wants to make an ex-parte sale.

Having started this matter himself, it looks to me like he ought to be estopped from making that kind of a request here, because when he went in to court on a Chapter XII proceeding he must have committed himself to go all the way.

The Court: Isn't the Chapter XII proceeding brought in the name of Jack P. Kalpakoff and Mary Kalpakoff?

Mr. Siemon: Yes, but counsel filed those papers for them. He prepared those papers for them.

Let me keep the court straight on that. I made this statement the other day: He filed the original petition and [8] he got the order staying and enjoining the sale.

Mr. Kalpakoff came to me afterwards and we filed an amended petition, because Mr. Durst had not listed the creditors. He had not listed the creditors. He had listed himself as the main creditor. We filed an amended petition.

He started this proceeding, he commenced this

proceeding. My clients, these debtors here, they know nothing about the legal phases of a thing of this kind.

Now, let's get down to this thing that we come in here this morning on. He says, first, he has got three pages in which he recites more or less matters that are already before the court, about the nature of the assignment, and so forth.

Then he says, in paragraph 7—he admitted that he was to operate when he took the assignment in '49—and he alleges in paragraph 7 that he decided not to operate in 1953 and has not operated in 1953 or 1954.

Now, then he alleges “\* \* \* whereupon the assignor instituted litigation in the state court to block the sale, \* \* \*”

Of course, that is a conclusion. It doesn't mean a thing from the standpoint of pleading.

But that suit in the state court was instituted for the purpose of, not blocking the sale, but for the purpose of terminating his trust on the ground of fraud, that he, as an attorney, representing these people, had an assignment [9] made to him, an absolutely, apparently ironclad assignment made to him as an attorney, while he was giving these people legal advice.

Then he, in addition to that, holds the property four years. He lets these people work it and turn the proceeds over to him, except for such as they need to live on.

We began this suit for the purpose of terminating this trust, which we definitely had a right to



do, and that suit is still pending. He says it is to block the sale. At that time there wasn't any possibility of any sale being made.

I may be overstepping my authority here, in stating these things, but he came back shortly afterwards with a sale for some sum of money, with a very small down payment and indefinite arrangements as to the balance of it. It was ridiculous and couldn't be accepted at all; we blocked that sale.

Then the next thing he claims that blocked the sale was the commencement of these proceedings. Obviously, Mr. Durst couldn't make a sale and give it good title with the state court action pending and a *lis pendens* filed, nor could he make a good title by making a sale now with these proceedings pending, and with that order of the Referee to turn over this property to the court.

Hence, the interference that is asserted right now is [10] the interference that may result from the state court proceedings and the interference that may result in this proceeding.

Now, the interference in this proceeding can be nothing more or less than the Referee's order that he turn over this property to the trustee, so he puts your Honor in a dilemma here.

What can you do? Can you dismiss the state court action and make an order that we abandon that state court proceeding? I think when we came into this court we brought all of these dirty wash into this court. I haven't dismissed the state court proceeding yet, but when this property is turned over to the trustee I will dismiss it, because I think

that this court in bankruptcy is adequate and efficient to handle everything between these parties that can possibly come up, including Mr. Durst—

The Court: I think, as we sit here now, that when the Chapter XII proceeding was commenced here, that that vested this court with total comprehensive jurisdiction in the matter.

Mr. Siemon: I think undoubtedly it did. I think there is no question about it.

And if there were any question about it, so far as Mr. Durst is concerned, I believe he would be estopped from asserting it, because he, as attorney, acting in the capacity [11] of an attorney, and also as trustee for these poor people over here, brought this petition into court for what? To protect himself from the imminent loss of these properties by foreclosure.

If, having done that, and then coming in, as they are doing now, and denying this court's jurisdiction, if that isn't a species of contempt of court I don't know what is. I really don't know.

I don't think your Honor has any authority here to grant any order on this petition, because, in the first place, they don't specify what the order should be. What should you do?

Could you say, "Referee Brink, set aside your order that this property be turned over to the court. Set it aside and let Mr. Durst go now"?

Then aren't we dismissing and releasing the assets, the corpus of this estate in bankruptcy? What control do we have over Mr. Durst making a sale?

If the trustee makes a sale, the trustee has to

come in here and file a petition to get it confirmed, and the creditors have notice of it. Is these anything in Mr. Durst's trust that gives the creditors or these people any protection at all?

He drew the trust and he did not specify in that trust what his powers should be, how they should be exercised. [12] He is an arbitrary trustee, under that trust, without any limitation whatever.

Why, he could sell this property. He has got an offer in here that I saw a minute ago for \$15,000.00 on \$50,000.00, or something like that, and the balance on terms.

We can't sell property like that. It is impossible to sell it. We must sell it for cash or some other assets that will come into this estate. It is impossible for us to administer in this bankruptcy with Mr. Durst holding this property. We can't do it. We just as well walk off and leave it.

The Court: How does the matter stand here on the contempt matter?

Mr. Siemon: Well, the record stands that I was to submit a brief after our argument. I submitted mine in 10 days. I think maybe I was a day late. I explained that to the clerk in the letter, and I sent the brief in.

They were to have 15 days, I think, to reply. And they haven't served me with any reply. As I stated a while ago,—

The Court: I haven't seen a transcript of the proceedings before Referee Brink.

Mr. Siemon: The transcript, the reporter told me two weeks ago he had it all ready, and that Mr.

Durst came in and said there was something omitted or some mistake.

The Court: Wasn't that a necessary part of your showing, [13] in order to procure a judgment of contempt here?

Mr. Siemon: No. I have a citation of the Referee. I have the certificate of the Referee. That is all I have to file, your Honor.

The Court: You haven't a certificate from the Referee on review of his order, have you?

Mr. Siemon: No. We have the certificate of the Referee citing it in here, citing him for contempt.

I think there are two certificates here. If your Honor please, may I say this: The substance of the matter before the Referee was simply this, "Mr. Durst, do you have any title to this property, other than as assignee for the benefit of creditors?"

No, he didn't.

Mr. Lavine: I understand that is an incorrect statement.

Mr. Siemon: It is not incorrect, if you please. The Referee questioned him as to what his title was, what his claim was, and he said he is an assignee for the benefit of creditors, and he commenced to argue the matter as to what his status as an assignee was, whether he held an estate or not.

And the Referee very aptly got down the section of bankruptcy act and read the section to him that applied to the power of the court to have him turn it over. And after a little talk, it didn't take over 15 minutes, he made the order. [14]

There wasn't any dispute, any matter disputed

there. He doesn't dispute anything now. He admits he is an assignee for the benefit of creditors.

Your Honor perhaps hasn't read the briefs, but the bankruptcy is very, very specific, that the court may order an assignee for the benefit of creditors to turn over the property to the trustee, and that the federal courts have taken the position that he is a mere agent for the debtor.

And after, I think, 27 pages of briefs, of authorities—I don't know whether your Honor has read them or not—27 pages of authorities of exhaustive matter, evasive matter, they haven't been able to cite a single case, not a single case from the federal courts or from the state courts that the Referee didn't have power to make that order.

I think it is a self-evident proposition. How in the world can this court administer in a bankruptcy estate like this, unless we have title? We can't go partners with him and have to go out and ask him, "Mr. Durst, in the federal court, can we make a sale of this property. Are you reasonable to making a sale," and that sort of thing. That would be sort of a surrender of jurisdiction, and it would be sort of a reflection on the court, to say we have to deal with a third party like that, and go out and give him the veto power as to whether we can administer this estate.

One thing more before I sit down, and I am going to [15] leave this to your Honor's decision after counsel answers, because I don't think my position here in the matter can be seriously disputed.

I have a party sitting here in the courtroom that will pay \$45,000.00 cash for one of these ranches.

He has got an offer in here, tentative offer, of part cash and part terms, and only a small part cash. We can't do that kind of business.

The only way we can sell this property and give a good title, your Honor, is for it to pass through the bankruptcy now on this proceeding.

In closing, I think your Honor would virtually be compelled to dismiss this bankruptcy proceeding if Mr. Durst is to not have interference like he wants. That is the issue.

Your Honor very wisely said, in the beginning, that this is simply a phase of that contempt proceeding, because if he is compelled to turn this over he has no right to sell. If he goes ahead and sells, then your Honor decided he doesn't, they would have to turn it over. That is the question. Thank you.

The Court: It would seem to me, Mr. Lavine, you can't run to the court and ask for its protection and then not be subject to its discipline.

Mr. Lavine: If your Honor pleases, we didn't run to the court for its protection.

The Court: Didn't you when you came in here under [16] Chapter XII?

Mr. Lavine: We didn't come in here under Chapter XII. Mr. Kalpakoff came in under Chapter XII.

The Court: You are now asserting some individual right of Mr. Durst.

Mr. Lavine: No. We are not asserting any in-

dividual right. We are merely, in view of the fact that they have come in here under a Chapter XII proceeding, and they have petitioned this court, we don't want Mr. Durst to be in contempt of this court, nor in violation of any position with this court.

We simply are seeking to have the relief which this court has, under its equity powers, to permit him to do what we believe his general assignment, made in good faith five years ago, authorized him to do.

Since they have come in here and sought the relief of this court, we wish to comply in every respect with any order of this court, to which we are required to comply, and to which we don't feel we want to be in violation of either the dignity or the right of this court.

Now, here is——

Mr. Siemon: Pardon me.

Mr. Lavine: Just a minute, Mr. Siemon.

Mr. Siemon: Let's clear this up.

Mr. Lavine: Let me finish my argument. [17]

Mr. Siemon: May I make interruption?

The Court: No, Mr. Siemon. Let Mr. Lavine finish. I know he interrupted you. He shouldn't have done it. I don't think you should, either.

Mr. Siemon: I think we can clear this up if I could ask a question.

Mr. Lavine: Here is the situation, your Honor pleases: Mr. Durst was granted a general assignment in this matter and became the general assign-

ment for the benefit of creditors under a common law assignment.

When a situation arose that the Kalpakoffs were seeking some relief, Mr. Durst, as trustee, told them what they could do. He told them to get their own counsel.

They did get their own counsel and that counsel has been vigorous in his handling of the matter, commendably vigorous. I don't criticize Mr. Siemon for making as good a fight as he can here. That is his duty.

But what they have sought to do right along is to interfere with sales, although they authorized sales.

In the documents before your Honor, you will find letters and confirmations and authority to Mr. Durst to sell these properties. Those authorities were consented to and every time he had a sale just about ready to be made—there was one sale for \$75,000.00 to \$80,000.00, and you will find the letter in the files, which are in the exhibits before your [18] Honor, where they corresponded about why they refused to let the sale go through. They still wanted to stay on the ranches. They wanted to maintain the ranches.

Now, there came a time where the creditors did not want to wait any longer and Mr. Durst felt it was his duty as the general assignee to sell those ranches, and he has had various sales offered.

In their application to this court, in their petition under the Chapter XII proceeding, all they set up as their interest is that of *Cestui Que Trust*.



They do not claim they have the rights of the general assignment, nor the rights of the creditors. They can't claim that. They have transferred that title to Mr. Durst.

Now, in connection with the authorities, I believe the authorities of the Supreme Court of the United States support our position, that this court lacks jurisdiction.

They were dissatisfied and commenced this action in the state court, to set aside the trust. There is no *lis pendens* pending at the present time, but there was one and that interfered with a potential sale of one of these ranches for \$75,000.00. The minute that was filed, of course, the sale blew up.

And now we have Mr. Durst having other potential sales being offered to him, various bidders have contacted him. There have been five or six. He wants to try to sell these [19] properties and then pay off these creditors.

Now, in so far as the proceedings in the Referee's court are concerned, the reporter got up what purported to be a transcript and brought it over to me, and even the statutes were in error in the quoting of the statutes that were discussed. There were other errors and omissions and he finally late Friday, I think, filed it with the clerk here.

There was a controversy as to whether this reporter's transcript had to be certified by the Referee. It was our view, before it should be filed here, it ought to be certified as correct. The reporter said that the Referee didn't want to certify it since you

ordered it, and he was going to have it filed here without any certificate.

There was a controversy as to whether this referred to in that proceeding that never were sent up here or never were included. Those include the opposition which Mr. Durst filed before the Referee, which was filed on July 7, 1954, in the bankruptcy court. And there is also the affidavit in support of the opposition, which was filed on the same date. Neither of these have been brought up here.

The record has been incomplete, and we feel that the notes of the reporter have been both inaccurate and incomplete. And although he has filed what purports to be a document in reference to the proceedings, it omits what we regard as having essential matters that took place in the court below, [20] and we agree with your Honor that before there could be any citation for contempt there had to be a reporter's transcript, the complete transcript of the proceedings, so that your Honor could review them and see whether there had, in fact, been one.

In respect to the authorities, there are two Supreme Court authorities which I believe sustain us very clearly. I have partly gotten up my brief, but without the reporter's transcript I didn't feel I could file it with accuracy, and I felt that this court was entitled to those documents.

In the meantime we have these proposed offers for the property, and the only relief we are seeking, if any relief, is the right of not having any interference in this matter, in accordance with the general assignment.

We are not asking this court for anything. We are merely seeking our right to proceed, since they have brought the Chapter XII proceeding and their amended petition shows that Mr. Siemon has revised the original petition completely, and that since this is an amended petition, that is the only petition actually before the court for consideration.

I can give your Honor a list of authorities which I believe support our position as to our rights not to be interfered with, and that all that is left for the Kalpakoffs is a remainder *Cestui Que Trust* after the sale has been made. That is all they have petitioned this court to control or [21] supervise.

Now they come in and ask your Honor to take over everything. That isn't what their schedules show. Their schedules show that the only thing they claim is the equitable right of *Cestui Que Trust*. That is all they set up. They seek to broaden that.

The case of *Mayer vs. Hellman*, 91 U. S. 496, the Supreme Court said:

“There did, indeed, remain to them \* \* \*”

The assignors “\* \* \* an equitable right to have paid over to them any remainder after the claims of all creditors are satisfied.”

Now, we deem that that right was sufficient to entitle them to raise the power of this court under Chapter XII, to preserve that equitable interest. But that is the extent to which this court, we feel, has or had jurisdiction in this matter.

We feel that we are entitled to an order permitting us to be not interfered with in any way in what we believe the general assignment holds, which

was made in good faith, and which was acted on over a period of five years.

The documents which have been offered in evidence, and I take it your Honor is receiving them in evidence for this proceeding, also, and they have heretofore been offered except this one letter——

The Court: Everything which has been filed will be deemed before the court.

Mr. Lavine: Thank you, your Honor. So I submit, your Honor, that in view of that fact that we should be permitted, if they have a proposed purchaser, there isn't any reason why Mr. Durst can't sell it. He has a general assignment, and if they want clear title and the sale is a good sale, I don't think we will have any problem about it.

What they want to do is remove all of Mr. Durst's rights and take them away, and all his obligations and take them away, and turn them over to a trustee in the bankruptcy court, which we respectfully submit there is no jurisdiction to do. And I intend to file with your Honor a series of authorities in connection with that matter——

The Court: When is the filing of the series of authorities going to end in this case and it be ready for submission? It seems to me it has been one of the scandals in the years past, that the Congress intended to overcome, that there had been delay and delay and these things had gone on largely for the benefit of the ones administering it. At least, it worked out that way. And I don't want it worked out that way in this case.

Mr. Lavine: If your Honor will grant this order, I think the properties will be sold.

The Court: The proposition having come into this court [23] through the Chapter XII proceeding, that you submit it or, at least, Kalpakoffs submitted themselves to the jurisdiction of the court, and Mr. Durst, having prepared and counseled that proceedings, is estopped to deny our jurisdiction.

Mr. Lavine: No, not acting as attorney and merely telling them what their rights are is not an estoppel. Certainly, he would be derelict in his duty as a trustee if he didn't advise them as to any possible procedure.

The Court: Wasn't he acting a bit in protection of his position as an assignee?

Mr. Lavine: Well, I assume that he was, your Honor.

The Court: Can you draw any other inference from the entire record but that he was?

Mr. Lavine: Yes, your Honor, I think you can. I think that it was certainly——

The Court: Can we do it, without being foolish? That is the tendency of the acts that were done. Doesn't it show that Mr. Durst was acting in protection of his interest for an assignee, with a right to compensation as such?

Mr. Lavine: I will not say, your Honor, it didn't serve his interest; it did. It served his interest there to prevent what was an imminent danger, but it was an imminent danger not only to—it was an imminent danger to the Kalpakoffs, because if they had been foreclosed there wouldn't

have been anything there at least for them to [24] receive, and he owed a duty to tell them, to protect themselves. If at the same time it protected his interest, it was something else.

Your Honor must bear in mind they had elected another forum in this matter. They had elected a plenary suit to try to oust him, and Mr. Durst certainly wasn't seeking the aid of this court to oust him from his position in charge of the general assignment. That certainly was not his object.

That is what they have tried to do, because he furnished them a crutch on which they might continue in their operations and continue in possession of the ranches, until they were sold. But in doing that, he didn't intend to deprive himself of the power to sell these ranches and to get the money and pay off the creditors, and let them have whatever balance there might be, and also to pay his own expenses for the cost of administration.

Mr. Durst calls my attention to a paragraph in one of the affidavits, which he desires me to call to your Honor's attention.

"That affiant is informed and believes, and based upon such information and belief, avers during, on or about December 1953, Mr. Kalpakoff received a letter from his attorney expressing his opinion that if both ranches went to foreclosure it might be possible to buy them in cheaply, and that a copy of this letter was sent to the trust deed holder of the Rosamond, [25] Kern County, 240-acre ranch."

And that came up after the hearing before the

Referee, to show want of equity in the Kalpakoffs in this proceeding.

And those facts were admitted and not denied, I am informed. I was not present.

Now, if your Honor pleases, it seems to me that the easy disposition of this matter is to allow Mr. Durst to go ahead and sell the ranches. One of the two parties has to sell. It is either Mr. Durst or the trustee.

Mr. Durst has had as many offers and as many, probably more than the trustee, your Honor. And I was informed at one stage one of the prospective purchasers had been sent down to Mr. Durst since our appearance before this court heretofore, and that he had been referred, I believe, by Mr. Siemon or by the Kalpakoffs; I don't know which.

Now, if your Honor pleases, the issue seems to be on the extent of the power and jurisdiction of this court which, I believe, this court has in respect solely to the interest of the *Cestui Que Trust*.

I think, that since they have the pendency of the state court proceeding, which is not dismissed, that they have elected that forum, as far as the plenary matters are concerned. So far as the sale is concerned, we are only here, your Honor, with a view to see if we can't effectuate something which we believe can be done if we obtain the orders sought by the [26] petition and the order to show cause here.

The Court: Now, Mr. Siemon, you had some thought here a few minutes ago when we asked you to wait until Mr. Lavine had finished his argument.

Mr. Lavine: May I add one other thought? The petition says if \$130,000.00 can be received for the sale of the two ranches, that would clear up all the indebtedness and might leave—and the expenses, and might leave something for the Cestui Que Trust.

Mr. Siemon: As to the matter I wanted to interrupt about, I thought I would ask counsel if he denied that Mr. Durst actually prepared the original petitions in these matters.

After listening to him a while, I assume that he doesn't deny that. They are on file and they will show, I think, from the similarity of his title he did prepare them.

The Court: We are not sitting here to examine documents—

Mr. Siemon: No. As to the sales that will be made, we will not consent to Mr. Durst making any sale, as we do not see any need of it at all.

He is not under bond. He is not under control of this court. If he makes the sale, the court has no control over the money or anything of the kind. There is no reason why the sale can't be made by the trustee. If Mr. Durst has claims, we will concede that they may be paid. But this is the place to settle them and not after he gets money in his hands and, when [27] we have to go out and try to take it away from him, to bring it into court to get administration.

Now, finally, this whole business, I think, as your Honor has correctly surmised and concluded, is a phase of the order to show cause why he shouldn't



be punished for contempt. It is a phase of it, because if you make a general order that he be not interfered with, I don't think it would mean a thing, because it would virtually have to amount to a dismissal of this case.

The title companies are not going to pass this title with the state court pending and with this court pending merely upon an order, general order that the Kalpakoffs and the trustee stop interfering, whatever that means.

So I think it is vexation, it is sham and it is contemptuous to come in here to this court, to ask for this order, when the other order is pending and when they admittedly haven't filed their briefs.

There is one thing more I want to say, and I want to sit down. The affidavit he mentioned he wants in the transcript is in the files, and his objections are in the file in the bankruptcy court. He doesn't need them in the reporter's transcript.

Furthermore, I don't know of any rule that requires that the reporter make a transcript of the thing, when the Referee makes his certificate, as to what transpired, and he has done [28] so twice. He has two certificates on file.

I will submit it that way. I think we ought to have a ruling. This delay is just murdering us.

The Court: I agree, you ought to have a ruling one way or the other. But I have come to the bench and received here, oh, it looks like about 20 pages of new material, or, at least, material that is physically new, even if it is reiteration of the other,

and I should study that and figure it out. We will get a decision to you within 20 days.

Mr. Siemon: We have been smothered with papers. We have a file in my office that is six inches high of things. Apparently, Mr. Durst hasn't anything else to do and he sits down at his typewriter and writes up something and gets his counsel to sign it. You can tell all these papers, apparently, with one or two exceptions, were clearly prepared on Mr. Durst's typewriter, with his counsel signing them. They just flooded us. We have something else to do, you and I, too.

The Court: Mr. Lavine is an industrious man. I think he probably had a hand in it, at least.

Mr. Siemon: I doubt if he saw this petition before.

Mr. Lavine: Yes, I have.

Mr. Siemon: Before he starts another thing—

The Court: It looks to me a higher critic of Mr. Lavine's work would say that this is typical of Mr. Lavine's [29] draftsmanship.

Mr. Siemon: From a lawyer's standpoint, that is quite a biting criticism.

Mr. Lavine: No, it isn't.

Mr. Siemon: If you read this petition over, if it has an allegation of anything new, I will eat my hat out here in the square.

The Court: If that is true, we will not hold you to that.

Mr. Siemon: If that is a pleading in any sense of the word, I have practiced law for 45 years without knowing what pleading means.

One thing more. In this book Mr. Lavine typed and got, I think it was, your Honor or the Referee to sign an injunction against these people, making their foreclosure sale that is in the file—not Mr. Lavine. Did I say Mr. Lavine?

Mr. Lavine: Yes.

Mr. Siemon: I meant Mr. Durst. He got an injunction before Mr. Lavine came into this thing, and got an injunction preventing this foreclosure sale.

I am going to submit it and your Honor can do what you want with it. I know we can't—

Mr. Lavine: Whatever the last act charged consisted of, it certainly was of benefit to Mr. Siemon's client. He ought to be over here thanking Mr. Durst for that. If it weren't for that the property would have been disposed of and his [30] clients would have been out, and he would have been out, and maybe I wouldn't have to be here, either.

So far as the reporter's transcript is concerned, we would like the other two documents that Mr. Durst—the opposition and the affidavit to be sent up here. We are prepared to submit our briefs. We would like that.

We would also like the notes of the reporter brought up here. They are certainly incomplete, and we think they should be impounded here, because this is a contempt proceeding, and we will submit the brief within 10 days now. I have the brief practically written, except for the things that—

The Court: Whatever happened to the transcript

of the proceedings the last day we were here? I understood that was going to be written up.

Mr. Lavine: I understood they had been ordered.

The Court: The reporter told me they had been ordered and not paid for.

Mr. Siemon: 10 days is just that much more time.

Mr. Lavine: We have 15 days from the date the reporter's transcript is filed. It wasn't lodged until last Friday.

Mr. Siemon: Counsel don't need it and I don't think they will make any use of it at all. The essential question is undisputed.

Mr. Lavine: Oh, yes.

Mr. Siemon: The essential question here is whether it [31] is an assignee; it don't make any difference what kind of an assignee.

The Court: I don't know, having sat here now, having heard you both argue, who is going forward and make sales here. Whoever is, should go forward. This case shouldn't be delayed any further in its administrative aspects.

Mr. Lavine: I agree with your Honor.

The Court: I would like to get the matter decided before I come to the bench next Monday. Can't you get it in, Mr. Lavine?

Mr. Lavine: Well, if your Honor——

The Court: I know your propensity with transcripts is to have all kinds of trouble with them. It is just one of the things that happens. I suppose you are probably the busiest lawyer in town.

Mr. Lavine: So far the transcript——

The Court: Those things ought to be resolved so those transcripts, in so far as they are needed here, would be immediately available.

Mr. Lavine: If your Honor pleases, we would like it to be corrected in accordance with what we feel the true facts are, and we are entitled to that, before any order of adjudication on some of these issues is made further.

If your Honor pleases, in respect to the transcript here, [32] we would like the transcript of the last proceedings written up. As your Honor knows, in order to pay for it, there must be some authority to the general assignment to authorize the payment.

In view of that fact, as it is in this court, if you will permit the general assignment to pay for that transcript of the proceedings of the last hearing, we will ask the reporter to prepare it right away so your Honor can decide the matter.

The Court: I didn't ask for it. I understand you had ordered it.

Mr. Lavine: I understood it had been ordered, and when the matter of cost came up that issue came up somewhere in the proceedings. I had told the reporter that we wanted it, and to go ahead with it. And then the reporter apparently contacted Mr. Durst, who said there had to be an authorization from this court.

The Court: In view of the doubts that have been cast on my jurisdiction, I will make no order on that subject now.

How long do you want, each of you, to get in any-

thing further in the way of memoranda of law or transcripts?

Mr. Siemon: I don't want any more time. All I ask—I know your Honor is ready to do so—is read my brief I already have in. It is thorough and comprehensive.

I don't want any time. I want those people to be [33] required to get in some briefs. I think your Honor suggested next Monday they ought to be in here.

Mr. Lavine: I have two stenographers working on a matter for the court of appeals, your Honor. If your Honor will give me 10 days we will get it in within 10 days.

We would like to have your Honor order up the opposition and the affidavit that was filed in the Referee's court, as part of the exhibits in this case.

Mr. Siemon: If the court please, I object to any order in favor of Mr. Durst. He was in here before and wanted an order to pay his attorney something—I covered that in my brief—for obstructing these proceedings.

They had a petition, actually a petition in here for this court to order something paid Mr. Lavine for obstructing these proceedings. I think that is the height of presumption, myself.

And to order the Referee, or, the assignee to be authorized to pay out money for this, I think that would be beyond the power of this court entirely. Let him pay his own bills.

The Court: Has the transcript been prepared upstairs?

Mr. Lavine: It has been prepared, yes, your Honor.

The Court: All right. Since it has been prepared there is probably nothing more to do, except to point out a few minor corrections, if it needs correcting. [34]

We will hold this matter open until next Monday at 12:00 o'clock noon for a transcript and any further briefs which are desired to be filed.

Mr. Lavine: I didn't hear your Honor.

The Court: 12:00 o'clock noon for any further briefs and for any transcript you desire to file; next Monday.

Mr. Lavine: Your Honor, will you order up the other two documents, so they may be part of the records in this case?

The Court: All right. So ordered.

Mr. Lavine: The opposition which was filed on July 7th and the affidavit of Mr. Durst.

The Court: They might throw some light on understanding just what the issues were before the court at the time you made the order, which has been in effect appealed from here; simply to clarify our record, we ought to have them.

Mr. Siemon: I think so. They are in the file, I think, anyhow.

The Court: Let's get that done, Mr. Lavine, so we can have it next Monday.

Mr. Lavine: Yes, your Honor.

Mr. Siemon: I won't need to be present, will I?

The Court: No, it is simply a matter of walking in and filing the papers.

Mr. Siemon: All right. Thank you.

(Whereupon, at 12:15 o'clock p.m., Monday, November 8, 1954, an adjournment was taken to Monday, November 15, 1954, at 10:30 o'clock a.m.) [35]

The Clerk: 60,963 and 64, in the matter of Jack P. Kalpakoff and Mary Kalpakoff.

The Court: Welcome back, Mr. Lavine. I didn't realize you were coming here today and I am entirely in the dark as to what you are here for.

Mr. Lavine: The hour of 12:00 hasn't struck yet, your Honor. I am here in accordance with your Honor's instructions that all papers should be in.

There were some mailed by my office on Friday, and they have certain errors, typographical errors, and I would like leave of the court to correct them, since they have already been filed and the filing stamp placed upon them. They came in the mail this morning.

The Court: All right. It appears here you wish to make some corrections in the reporter's transcript.

Mr. Lavine: That is another motion. But the first matter that I have is to have leave to make a couple of corrections on the papers that were filed this morning, in a couple of words. One on page 11, line 6.

The Court: Of what document?

Mr. Lavine: On the document re Reply on behalf of the assignee for the benefit of creditors appearing specially.



The Court: That is a document composed by you? [37]

Mr. Lavine: That is right.

The Court: Leave is granted. Interline it here in ink.

Mr. Lavine: I want to insert one case in there, a Ninth Circuit case, that was omitted.

The Court: You can do that in ink, too, so I can look to that document instead of to my notes.

Mr. Lavine: Very well. Then the document that I filed on July 26, 1954, it appears somebody wrote in the words "Answer In", and it should have been—that is not my writing, but it should have been, "Special Appearance in Proceedings".

I would like leave of the court to make that correction in the document of July 26th. It reads, in the typewritten form, "Proceedings on an Order to Show Cause Why Assignee Should Not Be Held for Contempt in a Chapter XII Proceeding; Denial of Acts Constituting Contempt; Challenge to Order as Null and Void; Opposition to Proposed Plan of Arrangement".

I want, in place of the words "Answer In" the words "Special Appearance in".

The Court: You may insert those words.

Mr. Lavine: On the top of that same document, "Attorney for Assignee Appearing Specially."

The Court: Yes.

Mr. Lavine: If your Honor pleases, there are three other documents that I wish to introduce this morning and offer in [38] evidence. They were supposed to have been brought up, two of them were

supposed to have been brought up here. One is the original notice, together with the proposed plan of arrangement, which was filed in the Referee's court. That didn't get up here, so we are offering our own copy in evidence, and ask it be filed. And then we have——

The Court: Do you mean that the originals are in the Referee's file and just didn't get here?

Mr. Lavine: That is right.

The Court: You are completing then that file, at least, so far as its contents are concerned?

Mr. Lavine: That is correct, so far as this part of the contents are concerned, yes.

The Court: That may be permitted.

Mr. Lavine: Also, we are offering in evidence another document, which was filed in the Referee's court and which did not come up here, and that is Walter Durst's special appearance in the Referee's court.

And then we are offering a document here to assist the court, consisting of a summary of proceedings pending in the District Court, with a list of the exhibits. We have listed from the date the first proceedings came here on July 7th on. We think it will be of material assistance to the court.

The Court: The first you have just now mentioned, I [39] understand, is something from the Referee's file that just didn't get here for our hearing last week?

Mr. Lavine: The first and second——

The Court: That one is admitted as evidence. The second one is in the nature of a memorandum?

Mr. Lavine: No, the second one is a special appearance of Walter Durst, also in the Referee's file. That is also offered in evidence.

The Court: All right. Admitted.

Mr. Lavine: Then there is the third document, which was also given to the Referee by Mr. Durst in propria persona, and we offer it in evidence, which is the opposition by Walter C. Durst, which he filed in the Referee's court; and we offer it in evidence in this court to complete our file.

The Court: All right. I have some question about doing all of this in the absence of Mr. Siemon. Did he have notice of this proceeding?

Mr. Lavine: Your Honor continued the matter for the filing of all papers until today, and these are papers that were filed in the Referee's court.

We asked the court to have the clerk bring up, I think, two of these, and your Honor made the order last week. They were not brought up, so we, in turn, are offering—Is that correct, Mr. Durst?

Mr. Durst: Yes. [40]

The Court: You are simply bringing up things from the Referee's court, but in lieu of disturbing his file you are bringing copies of things in it?

Mr. Lavine: That is correct.

The Court: All right.

Mr. Lavine: As to these matters.

The Court: All right. They are admitted.

Mr. Lavine: Now, we have a motion, your Honor, on the calendar for today, which was noticed upon Mr. Siemon and mailed to him, and we have moved this court to dismiss the contempt proceedings on

the ground that no record of an adequate nature has been filed in this court. There has been no reporter's transcript furnished to this court in reference to any contempt matter.

The Court: I don't see that matter calendared here.

Mr. Lavine: Yes, it is on your calendar, your Honor.

All the clerks' minutes apparently show is the motion to expunge the transcript. We have filed a motion to dismiss the citation for contempt. Here is a copy of it, and if your Honor feels appropriately that Mr. Siemon should receive notice of it, further notice of it—this being a matter that has been pending and your Honor asked that all papers and everything in relation to this matter be in before 12:00 o'clock today—we would have no objection to your Honor continuing the matter for a week to enable him to present any [41] reply or any opposition, or anything else he may have, if he so desires.

The Court: Has he been served with this motion?

Mr. Lavine: Mr. Durst informs me he has been.

The Court: We will continue this matter for all further proceedings until Monday at 10:00 o'clock, Monday of next week, so Mr. Siemon may appear in opposition to this motion to dismiss, if he desires to do so.

Mr. Lavine: Very well, your Honor.

Now, if your Honor pleases, so that we may be clear on our record here, we offer the files and the

documents in each of the proceedings numbered 1 to 9, inclusive, in the summary proceedings, in support of the challenge to the jurisdiction, and in support of the motion to dismiss the contempt proceedings, together with all proceedings in said matters, and such orders as may be made thereon, particularly to show the want of equity in the debtors and the trustee.

The Court: It would seem to me that that offer should have been made when the adversary parties were all here.

Mr. Lavine: We have made it in the writings. I think it implies it in all the matters. It is simply a repetition now of all the matters we have before your Honor.

I am trying to get it down into a nutshell. I think all these matters have been offered from time to time, and separately, and scattered, and we tried to get a summary before [42] your Honor here this morning of each—There are actually nine matters before your Honor. We listed them as to dates and proceeding.

We have now tried to simplify it so your Honor may look at these things one by one and quickly come to your own definite conclusion.

The Court: It may be admitted.

Mr. Lavine: If your Honor pleases, may I make this one suggestion to the court for its consideration in its ultimate disposition of this matter:

That if the sale is made and ordered, as we suggested in my memorandum, which is now on file with your Honor, which your Honor has given leave

to correct in a few spaces, the sales would convert the corpus of this estate into personal property which could readily be distributed and would not be subject to the Chapter XII proceedings, since it would be converted into personal property, and then the case could be dismissed.

We simply offer that for your Honor's consideration. It may take a month, it may take two or three months for a sale of this property to be made at an adequate price by the assignee, but we think it can be sold at a price, not only that would pay all of the debts, but would be something for the Cestui Que Trust.

Mr. Durst has asked me to point out that there is no [43] denial that these properties are worth \$130,000.00 and should bring that price, and that the total indebtedness on the properties plus the cost of administration, would run about \$106,000.00.

The Court: Well, if they bring that price, then there should be something left for the Kalpakoffs.

Mr. Lavine: If they are sold on the competitive market. If they have to be sold, as I have pointed out in my memorandum, your Honor, if it is sold either under a hammer by bankruptcy trustee or foreclosed, of course, it won't bring anything near enough probably even to take care of the creditors, plus all the different costs of administration that run in. There wouldn't be anything left to pay probably either the Kalpakoffs or pay some of the costs of administration that have been incurred up to this time, in the five-year operation of the

ranches, let alone any legal fees that now should be due and payable and accrued.

The Court: Now, is the matter ready to stand submitted?

Mr. Lavine: Yes, your Honor, except for these corrections and your Honor's putting it over.

The Court: You have leave to make any interlineations in ink and initial them, and I will look at them this afternoon.

Mr. Lavine: Thank you, your Honor. Mr. Durst has asked me to call to your Honor's attention, also, the Lancaster [44] property which is now in a great state of boom in that area, that it might well be well subject to subdivision possibilities. That would bring a better price——

The Court: That is a different character than it had at the outset of, at least, the assignee's administration.

Mr. Lavine: Yes.

(Whereupon, at 11:45 o'clock a.m., Monday, November 15, 1954, an adjournment was taken to Monday, November 22, 1954, at 10 o'clock a.m.) [45]

The Clerk: 60,963, in the matter of Jack P. Kalpakoff and 60,964, in the matter of Mary Kalpakoff.

Further hearing on motion of assignee to expunge purported reporter's transcripts of hearings before Referee July 7 and 9, 1954, and order separate verbatim transcripts; and motion to dismiss citation for contempt.

Mr. Durst: The assignee is present.

The Court: All right. Then I will give you the court's ruling on these matters. There are a great many of them.

Mr. Durst: May I request the court's permission, before the court rules, to speak?

Mr. Lavine instructed me to prepare objections to the certificates.

The Court: Mr. Durst, this matter has been going on since August—

Mr. Durst: Yes, sir.

The Court: —and anything which properly should have been presented to the court should have been presented before now.

It has been one of the great evils of the bankruptcy practice, which the so-called Bankruptcy Act, now getting old, is supposed to cure, that we get away from these interminable delays which harken somewhat back to *Jarness vs. Jarness*. [47]

Mr. Siemon isn't here today. Mr. Lavine isn't here today. The case goes on and on. Every Monday I take something under submission, and by the next Monday there is a new motion. This estate can be gotten eaten up by motions.

We are going to rule on what is before us now and close it.

The motion for the common law assignee for order setting aside the order of general reference is denied. The Referee is instructed to proceed.

The motion consolidating the estates is denied without prejudice. I think they should be consolidated.

The administration of the bankruptcy matters is



generally before a Referee. Since we are sending it back to the Referee, I will let the motion be made there and the Referee can pass upon it. That is where the motion should have been made, in the first instance. You don't have to appeal from the Referee to get matters consolidated.

There is nothing to show it was ever presented to the Referee, but you have leave to present it there now.

The motion of the common law assignee for an order approving filing one claim on behalf of all creditors is likewise denied, without prejudice to its being renewed before the Referee.

Now, this matter of the debtors' proposed arrangement comes on here in rather a, not too tightly formulated estate. [48] It is difficult to see an actual motion in it, but the court treats the filing of the opposition to the debtors' proposed arrangement and proposed new arrangement as a motion by the common law assignee for leave to file such opposition and proposal with the court. Such motion is denied without prejudice.

That could be presented to the Referee in due course.

Now, I don't think that I was correct in appointing an attorney for you, Mr. Durst. You are not an officer of the bankruptcy court. You are a common law assignee, and Mr. Lavine came in and said, well, you should be represented and I just didn't think it through at the moment. I thought certainly you should be represented, and I went ahead and appointed Mr. Lavine attorney for you.

That order was improperly and erroneously made by this court, and it is vacated as of this date.

Everything which has come here on the certificate from the Referee, the Referee is affirmed as to all questions. If they have not been disposed of by the specific rulings, but they have come here on the certificate from the Referee, the Referee is affirmed.

The matter of the contempt, the common law assignee is found to be in contempt.

I will continue the matter until next Monday, to see if he comes into compliance. [49]

We just necessarily then must decide the common law assignee's motion for restraining order to prevent interference with his management of the common law assignment, that that motion is denied. It also is tied to the motion to dismiss the citation of contempt. That is, in order to do these things orderly we should take care of that, although it raises no new issue beyond what is raised in the contempt citation itself, so that motion is also denied. That means it is unnecessary for us to consider the motions you wish to bring on today, which are new.

Mr. Durst: I would like to speak to the court, if the court will permit me.

The Court: Yes.

Mr. Durst: I observed in the transcript last Thursday that on page 50——

The Court: Transcript of the hearing of this court?

Mr. Durst: Hearing of September 13th. That on page 50, in colloquy, that this transpired:

“Mr. Siemon: May I say a word about that? The Referee, under federal procedures, certifies the proceeding and he has done so.

“Mr. Lavine: That doesn’t——”

He was interrupted.

“Mr. Siemon: There hasn’t been any attack on that certification.”

When I discovered this I called it to Mr. Lavine’s [50] attention, and Mr. Lavine instructed—or I instructed Mr. Lavine, in writing, as attorney for the assignment, to prepare objections to the certificates.

Mr. Lavine considered the matter and instructed me to do it. And I prepared the certificates. I worked over the weekend. I have the certificates—I mean the objections. There are no motions, but I believe in justice the counsel—or, the assignee should be allowed to file these objections for the completion of the record. They are objections to these certificates which the Referee has filed. I think just in justice the certificates——

The Court: I referred the matter back to the Referee.

Mr. Durst: Pardon me, sir.

The Court: I referred the matter back to the Referee.

Mr. Durst: Yes.

The Court: And I am not going to take any further action on it unless it comes up here again on a further certificate from the Referee.

Mr. Durst: I beg your pardon. May I consult with Mr. Lavine, please?

The Court: Yes, but not in the courtroom.

Mr. Durst: Then may the matter be held open on the calendar for a short—

The Court: No, the matter is closed so far as this court is concerned, except for memorializing these rulings by [51] appropriate orders Mr. Siemon should draw.

The clerk will notify him to prepare orders according to the Rules.

Mr. Durst: May I have these documents marked for identification: "Objections to Referee's Purported Certificate Filed August 17th, 1954, and Purported Supplement Thereto Filed November 10th, 1954" and "Objections to Referee's Purported Certificate Filed July 7th, 1954".

The Court: They will be lodged with the clerk, so that anyone looking at the record will see what was offered.

Now, that brings to mind, also, Mr. Durst, that on your behalf there were various exhibits offered and received here at the hearings which have heretofore been had.

Those will be transmitted to the Referee, because if he is going to proceed further he should have a full record as to what went on here, and is necessary to his purposes.

Mr. Durst: I would like to address myself to the court on one further subject, if it is proper.

I appreciate the court's comment respecting the counsel. I would merely desire that the court, as an assistance to the assignee, designate such value as the court may fix on services which have been

rendered. Not fixing them by making an order, but the court is in the best position to know the value of these services, and it would be of material assistance if that might be done. [52]

The Court: Since I have no power, I don't think I should just talk.

Mr. Durst: Yes, sir. Thank you, your Honor, I will lodge these documents.

Could these documents be marked for identification, please, sir?

The Court: Yes. So ordered. State what the marking is, Mr. Clerk, so the stenographic record will be clear.

The Kalpakoff matter, I have closed, Mr. Lavine. I am not going to be talked into re-opening it.

Mr. Lavine: Only as to the time your Honor gave the assignee to purge himself.

The Court: All he has to do is sign a document which Referee ordered him to sign.

Mr. Lavine: If your Honor pleases, that may be the subject of an appeal, and your Honor gave him a week to purge himself. Could your Honor extend that time, in view of the holidays intervening?

The Court: No. If you want to appeal, you will just have to move. If Mr. Durst wants to avoid the judgment of the court for contempt, he will have to move.

This matter has been just edging along here with procedural steps since last August, and it was already in a stale state at that time.

I don't think the court should, or that the court,

in [53] the discharge of its duties, can extend the time any further.

Mr. Lavine: Very well, your Honor.

The Clerk: Assignee's Exhibits L and M; Assignee Defendant's Exhibits L and M for identification.

(Whereupon, at 10:15 o'clock a.m., Monday, November 22, 1954, an adjournment was taken to Monday, November 29, 1954, at 10:00 o'clock a.m.) [54]

The Clerk: 60,963, in the matter of Jack P. Kalpakoff, and 60,964, in the matter of Mary Kalpakoff, hearing re assignee purging himself for contempt.

The Court: Mr. Durst, what have you done or what do you intend to do?

Mr. Durst: Assignee appearing specially must have been under some misapprehension, on Friday the assignee appearing specially was prepared to present a petition to the Circuit Court for a stay, but upon checking with the clerk it was ascertained that the order had not been signed.

There was also a misunderstanding, further, by the assignee appearing specially that the matter was continued. In that case, the assignee appearing specially desires to object to the sufficiency of the evidence in support of the contempt and desires to offer a letter dated August 13th from Referee Brink, addressed to Siemon & Siemon, and the contents thereof, as the assignee appearing specially's next exhibit, which letter indicates the opinion that the order of June 15th was premature.

Mr. Siemon understands about the letter. I would appreciate it if the court could look at this letter. It is a photostat that is presented.

The Court: Mark it for identification. [56]

Mr. Durst: That would be N.

The Clerk: Yes.

The Court: This contempt proceeding was handled very loosely. The court was given to understand a lot of things were true, but stipulations were not very tightly or comprehensively worded, and evidence was very meager.

Seeing that everyone proceeded upon the theory that Mr. Durst had been ordered to execute certain instruments and had refused to do so, I took it that there was no contrary evidence.

Mr. Durst: The assignee appearing specially does now offer all of the exhibits, A through N, the exhibit just marked, in support of the special appearance of the assignee, and objecting to the sufficiency of the evidence in support of that motion, and the contents of all those exhibits, together with the contents of the schedules, original schedules in bankruptcy, and the amended schedules in bankruptcy.

The Court: What do you make of it, Mr. Siemon?

Mr. Siemon: In reference to his letter that he has introduced there, I am under the impression that the Referee was of the opinion that he could not order a turnover until the arrangement had been approved.

I replied to that letter—I am not sure it is in the [57] file—I presume it is in the Referee's file, to

the effect that the statute gave the authority to order the turnover to a trustee or some one else, and it wasn't necessary to have the arrangement approved first.

In view of that, I should like to say that if Mr. Durst means to infer by the Referee's letter that the turnover order could not be made until the arrangement was accepted, it would be impossible to get an arrangement, because we cannot deal with the property until we have title to it. So that the turnover order is a necessary preliminary to the acceptance of any arrangement.

I wrote the Referee to that effect, and I presume that letter is on file.

I should like to call the court's attention to it, and have it considered. That is all I have to say on that point.

On this other point—

Mr. Durst: May I resume then, your Honor, please?

The Court: After Mr. Siemon is finished, yes.

Mr. Durst: Thank you, your Honor.

Mr. Siemon: On the question of evidence, I had the letter from the clerk, which is in the Referee's file, concerning the rulings that your Honor made. I haven't seen this transcript, but the proceedings, as I remember them, and I think I remember them quite distinctly, before the Referee, were quite informal. [58]

There wasn't any evidence, in the sense of witnesses being sworn and testifying. The Referee simply asked Mr. Durst if he was held as assignee



for the benefit of creditors, and he replied that he didn't.

The Referee then got the bankruptcy act and they discussed the provision of Section 2(a) (21), and there was some little discussion between Mr. Durst, appearing specially, as to that title tied on to his appearance.

As to his title as an assignee for the benefit of creditors, there was quite a little discussion back and forth in the way of an argument between the Referee and Mr. Durst, and I personally didn't get a chance to say anything, because it wasn't necessary and the thing was perfectly clear, that he, without any question, held the title as the assignee for the benefit of creditors. Consequently, the question of evidence, the condition of the evidence is one which is not very important. He doesn't yet claim that he holds any other way, except as assignee for the benefit of creditors.

He makes certain—I will be through in just a second—objections or exceptions, or whatever you may call them, and files them here in great volume, about the condition of the record. But he doesn't state a single fact that has been omitted from that record that is of any importance, and his statements are mostly recitals and conclusions and arguments.

So far as I know, I haven't heard a single fact from him [59] that bears on material that bears on the question before the court, and that question is a very simple one, does he hold, as an assignee for the benefit of creditors. If he does, this court, by the authority of the constitution of the United

States and the Congress, has the power, and I think, if I may say so, it is the duty, because this estate cannot possibly be administered with Mr. Durst having his finger in the pie, if I may use that word.

The Court: Just what document is it that you seek him to sign?

Mr. Siemon: The Referee ordered him to sign deeds and bills of sale transferring the property to the trustee and to satisfy a \$90,000.00 crop mortgage which he procured from these debtors. The \$90,000.00 crop mortgage is entirely fictitious, and there has never been any sort of money paid for this crop mortgage.

Now, I prepared and brought with me a proposed order on the contempt matter, and I would like to have the record show I am delivering Mr. Durst a copy of this proposed order.

This order, I take it, is one that is not made every day, and I picked this out of a form book and adapted it to this case. I will leave it with the clerk as the order that I think the court——

The Court: That is the order adjudicating the contempt, which we pronounced here last Monday?

Mr. Siemon: That is right, yes. It contains a description of the property he is required to turn over, and provides that he do so at once, forthwith.

If he fails to do so, that he be apprehended by the Marshal and confined to the County jail until he obeys the order, with the provision that he may excuse himself from contempt by complying with the order, purge himself. I will leave that with the clerk.

The Court: Orders rest here for five days after they are lodged, and then the court reconciles whatever problems arise from objections which have been made as to the form, unless counsel approve the form of order.

Do you want the five days, Mr. Durst?

Mr. Durst: Yes.

The Court: Or do you want to approve the form.

Mr. Durst: I am not in a position to approve the form. I observe a variance in the purging paragraph from the original order of the 15th. I have only had a chance to glance at it, and we would like the opportunity.

In the meantime, I would be pleased to be permitted to finish my little talk.

The Court: Yes, you may do so.

Mr. Durst: Thank you, your Honor. This subject of civil contempt is most interesting. I refer to the case of *Maggio vs. Zeitz*, 333 U. S. 56, from which I would like to make [61] a short quotation.

“There is no such reason for different measurements of proof in contempt and embezzlement cases; consequently, the two are almost identical. Fine, imprisonment or both can result from a conviction of either. \* \* \*

“All court proceedings, whether designated as civil or criminal contempt of court or given some other name, which may result in fine, prison sentences, or both, should in my judgment require the same measure of proof, and that measure should be proof beyond a reasonable doubt.”

The evidence, which counsel mentions in his opin-

ion is absent, is very complete. Exhibits A to M, and all the contents thereof are offered by the assignee appearing specially, together with the amended schedules, and original schedules in support of the proposition that there is no proof whatsoever of the validity of the order of June 15th.

Furthermore, Exhibits L and M, which were presented on the 22nd, Exhibit L, if I correctly quote it, being "Objections to Referee's Purported Certificate Filed June 7, 1954," contains specific and detailed objections to the form of the certificate and the contents thereof.

This, as the assignee appearing specially stated to the court on the 15th of November, matter only came to his notice [62] during the week before, about the 10th or 11th or 12th.

The Referee filed a purported supplemental certificate on November 10th, and the admission of that objection was denied, and in view of the fact that the matter is continued on the calendar, the assignee appearing specially now moves the court that the objections to Referee's purported certificate filed July 7, 1954, be filed in the contempt proceeding.

The assignee appearing specially, in connection with the petition for review, which is before the court, also moves the court that the Exhibit N, being objections to Referee's purported certificate filed August 17, 1954, and purported supplement thereto, filed November 10, 1954, be marked Exhibit M for identification, and be filed in these pro-

ceedings, in view of the continuance and the present state of the record.

Now, these certificates attacking the sufficiency of the transcript go to the fact that it may well be that the original petitions filed by the debtor, upon which—they had no standing to file such petitions—both the petition upon which the additional order to show cause was had and the petition of the trustee, upon which the contempt proceeding was started, are accompanied by an oath that neither are verified, according to the laws of California.

The transcript of the proceedings on June 9th, at which time the original order to transfer and convey was entered, were never available to this court until November 10th. This [63] transcript and the transcript of the contempt proceedings on July 7th were ordered by the assignee appearing specially on July 7th.

The certificate of the Referee on the petition for review was filed August 17th, four or five days after this letter of August 13th. The letter and the opinion stated in the letter did not accompany the certificate.

No letter was received by the assignee appearing specially or by his counsel in reply to that letter, which counsel mentions.

Then this court, to get this transcript up here, made its order on September 13th and it was not until October 18th that the assignee appearing specially was able to inspect a purported transcript, and that only after the assignee caused the original minute order to be served by the United States

Marshal on the reporter. And when the transcript was exhibited to the assignee appearing specially it was found to be deficient in many material matters, by omissions therefrom, all of which are set forth in a motion to expunge that transcript, which was before the court at the last hearing.

Now, this assignee appearing specially has been put to a heavy burden. He welcomes all work he can get. It is very pleasant and delightful.

This assignee appearing specially has observed the diligence with which this court works, and the time and consideration [64] which this court puts into the matters that it attends to.

Taking example from that, this assignee appearing specially tries to do the same thing, and the only purpose, the only reason the assignee appearing specially is here at all is to carry out the trust which the debtors and the assignor cast upon him.

They invited him into their affairs. The assignee appearing specially did not invite himself in.

It is respectfully submitted that this matter is serious. It involves many serious things and should be carefully considered.

I would like to address the court's attention to a similar circumstance which occurred around the turn of the century, where an assignee for the benefit of creditors——

The Court: That was before our present bankruptcy law.

Mr. Durst: No, right after it started, 1899. It wound up in the United States Supreme Court. The

case of Louisville Trust Co. vs. Comingor, 184 U. S. 18. It went through 3, 4, 5, 6 previous cases.

It was held that the assignee for the benefit of creditors was an adverse party; the court had no jurisdiction over him. That is the point which is asserted here.

This case of Louisville Trust Co. vs. Comingor has been cited, that it is still the law.

It was cited in the case of Galbraith vs. Valley, another [65] very leading case, which also dealt in an assignee for the benefit of creditors, and which held the court had no jurisdiction over him.

This Galbraith vs. Valley is cited in Emil vs. Hanley, United States Supreme Court case, which is the leading law on the subject of Section 2(a) (21).

Now, Section 2(a) (21) is a most interesting section.

The Court: I am not going into those merits again.

Mr. Durst: I appreciate that, your Honor, but the Valley case is cited in Emil vs. Hanley, the United States——

The Court: You are going into the merits again, aren't you?

Mr. Durst: I beg your pardon.

The Court: Don't do so, please. The Referee in bankruptcy ordered you to do certain things in the nature of a turnover order. You are judged guilty of contempt of court for not complying with that order.

Now, have you complied with it? You were given a week.

Mr. Durst: I must——

The Court: Just answer yes or no. Have you complied with Referee Brink's order to turnover? I don't want any argument. I want just an answer.

Have you complied with it or haven't you?

Mr. Durst: I hand to the clerk a letter dated November 29, 1954,—— [66]

The Court: Please, Mr. Durst, will you answer the question? I know you have legal objections, and we are going to protect them for you.

Mr. Durst: Thank you, your Honor. Yes, I have complied with it.

The Court: All right.

Mr. Siemon: May I ask——

Mr. Durst: I ask this document, which I have handed in, be spread upon this record in its entirety, a letter to your Honor delivering a deed, in accordance with the order, and that the contents, that the document itself be marked as an exhibit, Exhibit O, and that the contents of the letter and of the deed be admitted in support of the objections to evidence warranting the finding of contempt.

Mr. Siemon: This is a surprise to me.

The Court: Well, it is a surprise to me that a man would argue here to the extent that we didn't have any evidence, and that he was improperly found guilty of contempt, and then would undertake to purge himself from it.

The matter is continued until 3:30 this afternoon,



and I will look things over, Mr. Siemon. Possibly you are going to get along.

Mr. Siemon: Did you say 2:30?

The Court: I said 3:30. We are trying a case.

Mr. Siemon: In the meantime, I can look at that [67] (indicating)?

The Court: In the meantime everything that has been filed will be available to you.

Mr. Durst: I would like to make a—Your Honor stated my legal rights will be protected.

In furtherance of that—if I am improper in speaking, I will be admonished.

The Court: Mr. Durst, what I had in mind simply is, you were found guilty of civil contempt for failure to turn over as ordered.

Now, you don't just appeal from things of that kind. If you think you are right, you persist in your acts which the court declares contemptuous. The court then commits you to the custody of the Attorney General until you comply with the order. That is the usual thing.

You then procure a writ of habeas corpus and test it out on habeas corpus.

Mr. Durst: If the court would permit me, I would like to make a statement in that respect.

The Court: Well, we will take it up at 3:30.

Mr. Durst: May I make a short statement, please?

The Court: We will take it up at 3:30. The matter is continued until that time.

(Whereupon, a recess was taken from 10:30

o'clock a.m. to 3:30 o'clock p.m. of the same day.) [68]

The Court: Counsel, did you look over what Mr. Durst presented this morning as compliance?

Mr. Siemon: Yes, your Honor. He presented a long letter and a deed.

While the deed doesn't appear to have much to commend it in the way of form, it is probably sufficient except that the word "we"—w-e—is used for "23," line 9, page 2. That is the designation of a section of land, "We."

Mr. Lavine: You want "23" written in, in place of the word "we"?

Mr. Siemon: It doesn't make any sense the way it is.

Mr. Lavine: We will conform it to conform with the description, if that is agreeable with Mr. Durst.

Mr. Siemon: There is a long description there that I don't think has any place in the letter. It is sort of a wail after he has complied. He done it, notwithstanding. I think there are 23 "notwithstandings".

The Court: Mr. Durst has, no doubt, earned some fees and he wants to protect himself, you can understand that.

Mr. Siemon: I don't think that letter has any place in this record. I have this to suggest:—

The Court: There are a lot of things, Mr. Siemon, that come into these records that don't have any place in them. [69] Lawyers are forever saying things that are not, strictly speaking, germane to what they should do in regard to the proceedings.

Perhaps this is just one of those things. I will terminate it, and go forward with your motion.

Mr. Siemon: I would rather like to proceed in an orderly manner. The deed was ordered to be filed with the Referee. It is filed here now before your Honor makes any order on the contempt.

Now, I don't know whether he means to concede that the contempt order should be made or what becomes of the contempt order.

He has filed his deed, which is a substantial compliance with the Referee's order. I don't know just where I am.

The Court: Well, first, the matter before the Referee came up here on petition for review. During the day your papers have reached me, that is, the form of order that the court should make.

You don't find on the contempt. There are one or two other things that are not dealt with, which were before the court.

I thought you dealt too kindly with me when you said that in appointing Mr. Lavine it was an inadvertent error. I think it was just plain error.

Mr. Lavine: I disagree. I think the assignee had a right to his counsel. And in bankruptcy every act that [70] anyone does has to be approved by the court.

The Court: Of course, he has the right to have counsel and you did very well by him, Mr. Lavine.

Mr. Lavine: Thank you, your Honor.

The Court: I think each of you are entitled to some compensation. I don't think in a bankruptcy matter I have a right to appoint counsel for a com-

mon law assignee. That is a right which is governed by the common law which says Mr. Durst goes out and hires one himself.

Now, it might be—I don't know—that you are entitled to compensation out of the estate. I couldn't say. But certainly equity would indicate that, having rendered services here, that you are.

Now, we have, first of all, the problem of the sufficiency of the deed, which it would at first-hand appear to the court that there is a typographical error in it.

Mr. Lavine: We will correct that right now.

Mr. Siemon: Let that be done.

Mr. Lavine: We will do it right away.

The Court: Now, it has been notarized, hasn't it, acknowledged before a notary public in its erroneous form?

Mr. Siemon: It is notarized.

Mr. Lavine: However, it being a matter that this court directed, it seems to me that your Honor, as a magistrate, could acknowledge the correction of the typographical error. [71] We will raise no question about it. I think no one else can.

Mr. Durst will initial the correction, and if your Honor still wishes the notary to initial the correction, if your Honor will give us leave to take the deed out,—or we will have the notary come up here. As a matter of fact, the notary is available.

Mr. Siemon: I don't know that that is necessary.

The Court: I don't know that that is necessary. Let's have Mr. Durst initial the correction here in open court, and that should be sufficient.

Mr. Lavine: We will get the deed and we will correct the typographical error. We wouldn't need rubbers on lead pencils if mistakes weren't made, your Honor.

The Court: Well, it was a great invention.

Mr. Lavine: Will you examine it, Mr. Siemon, and see it complies with your request?

Mr. Siemon: It is all right.

The Court: It is a deed which will be recorded, isn't it?

Mr. Lavine: Yes, your Honor.

The Court: It might simplify things, so far as the recording laws of the state of California are concerned, if it simply be re-acknowledged.

I have a notary in my chambers who will take a new acknowledgment. [72]

Mr. Lavine: Very well, your Honor. We will have that done right away, if your Honor wants to have the notary to come out here, or any way that suits your Honor.

The Court: Mr. Bailiff, will you ask the notary to come in?

The Bailiff: Yes, sir.

The Court: I hope this situation works out so that the most is realized from the property, and that equity is done to all persons who have rendered services, even if those services have been supplanted by the performance of others.

Mr. Lavine: We hope so, too, your Honor. There is no question but that these ranches are worth \$130,000.00. Whether they bring that under a forced sale is another question.

But with the proper supervision of the possible sale, we think they can bring at least \$130,000.00.

The ranch that is out at Lancaster is certainly in an area that is rapidly booming and conditions that didn't exist when Mr. Durst took these properties over at the present time, as your Honor is probably aware, do exist, as the airplane industry is moving out there and jet propulsion is being developed in that area.

With the proper supervision of the sales of those ranches, that particular ranch, at least, as a subdivision property, could well bring in excess of \$130,000.00,—with [73] both ranches. I don't know what that one could bring alone. I think it could bring a much greater price than at any time before. That is just merely a comment.

Mr. Siemon: Now we are talking, I hope you people are in a position to buy it at those prices.

The Court: Mr. Lavine is in a position to buy at those prices, but his preference for investment has run to another section of the county.

Mr. Siemon: We have not been able to get offers which would come—

The Court: Miss Leland, a deed has been executed and notarized. It appears to have a typographical error.

The grantor under that deed is going to correct the error. Then I think it should be re-acknowledged.

Will you take the acknowledgment?

Miss Leland: Yes, sir.

The Court: If it were a Superior Court, it would be taken by the clerk.

Mr. Lavine: Yes.

The Court: I don't know that the clerk of the United States District Court would qualify, under the recording laws of the state of California.

Mr. Lavine: I think one of them is——

The Court: I think they qualify by virtue of being notaries. It is essentially a California law, rather than a [74] Federal law.

Mr. Siemon: There is one matter that might be mentioned at this time.

The Court: It isn't an oath. It is simply an acknowledgment.

Mr. Lavine: Yes.

Mr. Siemon: Mr. Durst has signed carefully in each case as assignee for the benefit of creditors. I presume that that would be unobjectionable, but it might be possible that the title company wouldn't pass that. I am willing to try it that way.

The Court: Well, that is a capacity in which he has acted.

Mr. Siemon: That is very true. That is probably descriptive——

The Court: I think it is. I am sure, though, you will need before you get through here an order of this court affirming the Referee. You recall we had a review upon the Referee's certificate, and the order which he prepared, you did not have me affirm the Referee. It should be a separate order, and the court will.

Mr. Siemon: I will make a note of that.

The Court: You send one in and get Mr. Lavine's approval as to form.

Mr. Lavine: Mr. Siemon. [75]

Mr. Siemon: Yes. He is executing it. I will try to get by with it.

Let me see if I understand. He petitioned for a review, and that, you say my orders sent in didn't cover that.

The Court: I don't think they do.

Mr. Siemon: I will check on it.

The Court: It should be a separate order, because it was a separate proceeding.

We act as the appellate court for the referees in bankruptcy. This court affirmed the Referee there.

Mr. Siemon: I have no objection to this, if your Honor thinks it is satisfactory. I would like to have a copy of it.

It is ordered that the order of the Referee entered June 15, 1954, being order requiring, directing assignee for benefit of creditors, delivering property in their possession, is affirmed.

The Court: Is it satisfactory as to form?

Mr. Siemon: Yes. I scarcely see the necessity of it. I proceeded on the theory you had denied the petition for review.

There was an order to that effect in his file. This won't hurt it.

The Court: I think at worst it will just be surplusage. I don't see any reason for a formal judgment on the contempt matter. It might be, Mr. Lavine, helpful with respect to [76] your claim for fees in the bankruptcy proceeding.



If you find it presents an—or have your opponent do it and approve it as to form.

In the absence of that, people sometimes misconstrue these things, and I don't like to sign a judgment binding a faithful officer of the court in contempt.

Mr. Lavine: We are not interested in that. I don't want to collect any fees or anything involving your Honor signing an order, requiring your Honor to sign an order. If that becomes necessary, that part, I feel, very deeply toward my fellow brethren in the law in these matters. I would render that service to anyone who found himself in that unfortunate position.

Mr. Siemon: This leaves the thing open, and I suppose the proper order would be to recite these proceedings today and say, Mr. Durst, having complied with the order in open court, the contempt proceeding is dismissed.

Mr. Lavine: That would be agreeable.

The Court: Yes.

Mr. Siemon: I will send such an order to counsel and the court.

The Court: Send it to Mr. Lavine and he can note his approval on it, and he can send it on to the court.

If he disagrees, you can get together on some suitable language. [77]

Mr. Siemon: I will send it and your Honor can note the five-day period, and if he has any objection to it he can notify the court.

Mr. Lavine: Yes.

Mr. Siemon: I think that is all. Thank you very much for your patience.

The Court: Yes.

(Whereupon, at 4:00 o'clock p.m., Monday, November 29, 1954, an adjournment was taken.)

[Endorsed]: Filed February 9, 1955.

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[Endorsed]: No. 14655. United States Court of Appeals for the Ninth Circuit. Walter C. Durst, assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, debtors, Appellant, vs. Jack P. Kalpakoff and Mary Kalpakoff, and William Chernabaeff, Trustee in Bankruptcy of the Estate of Jack P. Kalpakoff and Mary Kalpakoff, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: February 9, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14655

In the Matter of the Estates of JACK P. KALPAKOFF (District Court No. 60963-T) and MARY KALPAKOFF (District Court No. 60964-T), Debtors.

STATEMENT OF POINTS TO BE RELIED  
UPON BY APPELLANT

Comes now the appellant Walter C. Durst Assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff appearing specially, and herein sets forth a statement of the points which appellant intends to rely upon on appeal:

I.

The Bankruptcy Court erred in ruling that Congress inherently and as Construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the general assignment and creditors of the general assignment of property and other rights guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States, and to alter, modify or change California law respecting a valid, irrevocable, common law general assignment the two ranches of which appraise at \$117,835. Ever since November 25, 1949, appellant has been and still is the only person lawfully in the possession thereof, in which creditors whose claims total about \$110,000, (\$30,000 of which had no payment for

over five years four months) are fixed as to Liability and liquidated as to amount and are coupled with an interest in the general assignment in the execution of the imperative and unreleasable power of sale for the payment of their claims 100 cents on the dollar, if possible, the surplus to the resulting cestui que trust as their scheduled interest appears. That bankruptcy Act Section 2 a (21) as here applied is unconstitutional.

## II.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to enlarge the only rights of Jack P. Kalpakoff and Mary Kalpakoff as resulting cestui que trust, which were the only rights which they asserted in their schedules in bankruptcy. The Bankruptcy Court, therefore, acquired no jurisdiction of the res by reason of their petitions under Chapter XII of the Bankruptcy Act. The Jurisdiction of the Bankruptcy Court could extend no farther than the allegations of the Petitioner in Bankruptcy.

## III.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in

this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, particularly respecting the substantive law of trusts that the execution of a non-object of the power of sale of the general assignment is a fraud on the power of sale and deprives the creditors of the general assignment of the execution of the power of sale and the immediate payment of their claims 100 cents on the dollar, if possible, and the surplus, if any, to the resulting cestui que trust as their scheduled interest appears. Fraud in this connection does not necessarily imply any moral turpitude, but is used to cover all cases where the purpose of those who seek the execution of a non object of the power of sale is to effect some bye or sinister object, whether such purpose be selfish or, in the belief of the persons seeking to execute such non object of the power of sale is a more beneficial mode of dealing with the property than that provided in the general assignment. Where, as here, the debtors since 1952, through blocking sales, by suit and otherwise sought and seek the execution of the non object of the power of sale, to-wit, the development of one of two ranches through the sale or operation of the other in lieu and in stead of execution of the power of sale to pay creditors 100 cents on the dollar if possible, the surplus if any, to the resulting cestui que trust.

## IV.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the Creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts illegally to modify, alter, or change vested rights of the creditors of the general assignment coupled with an interest in the imperative, unreleaseable power of sale by the execution of which the creditors whose claims total about \$110,000, about \$30,000 of which have had no payment for over five years and four months and except as their rights may appear in State Court suit may be exposed to the Statute of Limitations in Bankruptcy, which vested rights enable the creditors to be paid 100 cents on the dollar, if possible, the surplus, if any, to the resulting cestui que trust as their scheduled interest appears.

## V.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts illegally to oust an assignee for the benefit of credi-

tors and compel him to assign assets to the trustee in bankruptcy in contravention of applicable substantive California law, to general assignment more than four months prior to bankruptcy.

## VI.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in ordering the Assignee for the benefit of Creditors to turn over two parcels of land to the trustee in bankruptcy after over five years and four months. Such a proceeding would be inequitable since the creditors of the general assignment relied on the general assignment and, thus, as to the general assignment only, waived the right to proceed within the statutory time under State Court procedure to enforce their debts and compel the payment to them of the moneys due them under State Court procedure within the period of the Statute of Limitations, but preserved in the prior pending plenary State Court Equity receivership action to which they are made indispensable parties defendant by order of the State Court.

## VII.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a

(21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts illegally to alter, modify or change California laws forbidding acts in contravention of the express terms of a trust, forbidding the release of an imperative power in trust, and limiting attacks on a trust after three years by the resulting cestui que trust.

### VIII.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and particularly the protection of the four year statute of limitations which the prior pending State Court equity receivership suit tolls but which it may be possible for the debtors to assert in the Bankruptcy proceedings begun over four years and five months after the creation of the general assignment.

### IX.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the Creditors of the general assign-



ment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to alter, modify or change substantive law of trusts to enlarge the power of any court, except a court of equity as here invoked in the prior pending plenary State Court Equity suit, or otherwise to adjudicate the rights of the beneficiaries of trustee of a trust.

### X.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to change, alter or modify the body of law which holds that a bankruptcy court lacks jurisdiction to administer by summary proceedings property in the possession of a third person who holds adversely and without consent to proceed, and appears specially and challenges the jurisdiction and withheld and withholds his consent to each all and every proceeding herein as binding on the general assignment or otherwise, except as to the administration of the scheduled interest of the resulting cestui que trust.

### XI.

The Bankruptcy Court erred in ruling that Con-

gress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to alter, modify or change the law of trusts respecting creditors as beneficiaries of a trust being indispensable parties to an attack on the trust created by the general assignment as ordered by demurrer sustained in the debtor's attack on the trust in the prior pending plenary State Court equity receivership suit, but overruled on motion to dismiss in the debtors' identical attack on the trust in the Bankruptcy Court.

## XII.

The Bankruptcy Court erred in omitting to order all issues raised by the two identical attacks by the debtors on the general assignment, first in the State Court and second in the Bankruptcy Court, relegated to the prior pending plenary State Court equity receivership suit for the protection of the rights of the creditors and of the scheduled interest of the debtors as resulting cestui que trust in the surplus, if any, remaining.

## XIII.

The Bankruptcy Court erred in denying restraining order, stay, and injunction to permit administration of the general assignment by appellant as trustee pending appeal without let or hindrance of

the resulting cestui que trust as their scheduled interest appears, and as their rights appear in the prior pending plenary State Court equity receivership suit and as the rights of the creditors therein appear being by order of the State Court named indispensable parties defendant in said suit, which suit tolls the four year statute of limitations as to said creditors claims, said suit having been at issue between the plaintiffs and the assignee since November 1953, but plaintiffs have never brought same to trial.

#### XIV.

The Bankruptcy Court erred in holding that the Court of Bankruptcy had jurisdiction to make the finding of contempt which is wholly unsupported by the evidence and is contrary thereto, where the appellant has complied with the turnover order by executing a deed, depositing same with the clerk and accounting in said turnover order required.

#### XV.

The Bankruptcy Court erred in denying stay, injunction and restraining order where the appellant had complied with the turnover order of June 15, 1954, by depositing deed with the Clerk of the District Court and accounting.

#### XVI.

The Bankruptcy Court erred in omitting to hold that the Referee in Bankruptcy and the Trustee in Bankruptcy and each of them are amendable to the Rules of the United States District Court for the

Southern District of California, and particularly rule 7 (a) and rule 204 (a) as to all matters originating in the Referee's office.

#### XVII.

The Bankruptcy Court erred in denying appellant's petition for leave to file one claim, for leave to oppose the debtor's plan of arrangement and for leave to propose a plan of arrangement under Bankruptcy Act Section 466, all without prejudice to the special appearance of appellant.

#### XVIII.

The Bankruptcy Court erred in vacating and setting aside the order appointing Morris Lavine as attorney for the appellant.

#### XIX.

The Bankruptcy Court erred in denying the petition to set aside the order of general reference herein.

#### XX.

The Bankruptcy Court erred in denying the Motion that the debtors and the trustee in bankruptcy are bound by the contractual obligations of the assignor with appellant.

#### XXI.

The Bankruptcy Court erred in denying leave to the appellant to file objections to the certificates of the Referee filed July 7, 1954, August 17, 1954, and November 10, 1954.

XXII.

The Bankruptcy Court erred in not reversing the turnover order upon the opinion of the referee expressed in the referee's letter of August 13, 1954.

XXIII.

The Bankruptcy Court erred in not expunging the purported reporter's transcripts of hearings before the referee of June 9, 1954, and July 7, 1954, and ordering verbatim transcripts of said hearings.

XXIV.

The Bankruptcy Court erred in making the turnover order of June 15, 1954, in that the same is contrary to applicable law, omits to provide that the trust and the power of sale created by the general assignment follow the land and that the trustee in bankruptcy is bound thereby.

XXV.

The Bankruptcy Court erred in holding that the Court of Bankruptcy had jurisdiction to supersede the prior pending plenary State Court equity receivership suit for the cancellation of the general assignment, turnover and accounting, which tribunal first acquired jurisdiction of the cause by the issuance and service of process more than four months prior to bankruptcy and is entitled to retain it.

XXVI.

The Bankruptcy Court erred in noticing for hearing during the time for appeal from the orders of

the District Court affirming the referee, and proceeding after appeal, to hear the amended plan of arrangement of the debtors, and to order sale of one of the ranches in furtherance thereof, while a creditor's objections to petitions of Jack P. Kalpakoff and Mary Kalpakoff for real property arrangements filed September 13, 1954 in the District Court remain undisposed of, and while similar matters are on appeal being denial of the motion of the appellant for leave to file objections to the plan of arrangement, for leave to file plan of arrangement under Bankruptcy Act Section 466, and for leave to file one claim in the debtor proceedings covering all claims of all of the creditors of the general assignment and the expenses of administration of the general assignment.

#### XXVII.

The Bankruptcy Court erred in granting the application of the trustee in bankruptcy for release of the valid live deed deposited with the Clerk by appellant.

#### XXVIII.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The orders are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and attempt illegally to alter, modify or change the law as set forth in the California

Code of Civil Procedure Section 944, which reads:

“If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.”

### XXIX.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The orders are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and attempt illegally to alter, modify or change the law as set forth in the California Civil Code Section 870, which reads:

“Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other acts of the trustees, in contravention of the trust, is absolutely void.”

### XXX.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the

United States and attempt illegally to release, alter, modify or change the imperative power of sale of the general assignment being unreleasable by the law as set forth in the California Civil Code Section 1060, which reads in part:

“1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, \* \* \*” (Emphasis added.)

### XXXI.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The orders are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempt illegally to alter, modify or change the statute of limitations being California Code of Civil Procedure Section 338 which limits an action by the assignor to cancel the trust created by the general assignment to three years; also the orders purport to enlarge the four month's period in bankruptcy within which the assignor, by voluntary bankruptcy, may destroy the general assignment created by the assignor.

### XXXII.

The Bankruptcy Court erred in ruling that the Congress inherently and as construed and applied in this case intended by the Bankruptcy Act to de-



prive the creditors of the general assignment and the trust created thereby of their vested property and other rights guaranteed by due process of law. The Bankruptcy Act as here applied to the trust created by the general assignment is unconstitutional. The orders, and each of them, affecting the rights of said creditors, and herein appealed, are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, to the extent that same attempt illegally to alter, modify or change the law respecting the termination of the trust created by the general assignment, as set forth in the California Civil Code Section 2279, which reads:

“A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful.”

/s/ MORRIS LAVINE,  
Attorney for the Appellant  
Appearing Specially

[Endorsed]: Filed Apr. 19, 1955. Paul P. O'Brien,  
Clerk.

